EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

92-1397

No. _____

Supreme Court, U.S.
FILED
FEB 23 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

L. NEWSOM, R. PHILLIPS, J. THOMAS, THE CITY OF SOUTHFIELD, a municipal corporation, and the SOUTHFIELD POLICE DEPARTMENT, Jointly and Severally,

Petitioners,

v.

JACQUFLINE WASHINGTON, Personal Representative of THE ESTATE OF WILLIAM ELLINGTON, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

AND APPENDIX

MARCIA L. HOWE
Counsel of Record
CUMMINGS, MCCLOREY, DAVIS & ACHO, P.C.
33900 Schoolcraft
Livonia, Michigan 48150-1392
(313) 261-2400

Counsel for Petitioners

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

QUESTIONS SUBMITTED FOR REVIEW

I.

WHETHER THE SIXTH CIRCUIT'S MINORITY POSITION THAT QUALIFIED IMMUNITY IS NOT AVAILABLE TO A POLICE OFFICER ACCUSED OF EXCESSIVE FORCE PURSUANT TO 42 U.S.C. 1983 IS IN CONFLICT WITH THIS COURT'S DECISION IN *MITCHELL* v. *FORSYTH*, 472 U.S. 511 (1985)?

II.

WHETHER THE PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY WHERE THE ACTIONS DO NOT RISE TO THE LEVEL OF A CONSTITUTIONAL VIOLATION AND THEIR ACTIONS DO NOT VIOLATE A CLEARLY ESTABLISHED RIGHT IN WOUNDING THE SUSPECT FLEEING FROM AN ARMED ROBBERY WHEN THE OFFICERS PERCEIVED HIM TO BE A THREAT TO THE POLICE AND THE PUBLIC?

TABLE OF CONTENTS

PAGE

QUESTIONS SUBMITTED FOR REVIEW i

TABLE OF AUTHORITIES ..... iv-v

OPINIONS BELOW 1-2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

PROCEDURAL HISTORY 2-3

STATEMENT OF FACTS 3-7

REASON FOR GRANTING THE WRIT:

INTRODUCTION 7-8

I. THE SIXTH CIRCUIT COURT OF APPEALS MINORITY POSITION THAT QUALIFIED IMMUNITY IS NOT AVAILABLE IN AN EXCESSIVE FORCE CASE RUNS CONTRARY TO THIS COURT'S DECISION IN *MITCHELL* v. *FORSYTH*, 472 U.S. 511 (1985). 8-10

II. THE POLICE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEY DID NOT VIOLATE A CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT BY USING DEADLY FORCE AGAINST A SUSPECT FLEEING AN ARMED ROBBERY WHO PRESENTED A DANGER TO THE POLICE AND THE GENERAL PUBLIC AT THE TIME OF THE SHOOTING. 10-26

CONCLUSION 27

APPENDIX:

ORDER DENYING REHEARING: United States Court of Appeals for the Sixth Circuit (*12/21/92*) A-1

OPINION: United States Court of Appeals for the Sixth Circuit (*10/15/92*) A-2

PAGE

VERIFIED COMPLAINT: United States District Court, Eastern District of Michigan, Southern Division (*7/25/90*) A-12

REQUEST FOR ADMISSIONS: United States District Court, Eastern District of Michigan, Southern Division (*6/14/90*) A-20

SUMMONS: United States District Court, Eastern District of Michigan, Southern Division (*7/25/90*) A-22

ANSWER TO COMPLAINT: United States District Court, Eastern District of Michigan, Southern Division (*8/90*) A-24

PROTECTIVE ORDER: United States District Court, Eastern District of Michigan, Southern Division (*1/29/91*) A-33

DEFENDANTS' ANSWER TO PLAINTIFF'S COMPLAINT: United States District Court, Eastern District of Michigan, Southern Division (*10/9/90*) A-35

MEMORANDUM AND ORDER: United States District Court, Eastern District of Michigan, Southern Division (*11/1/91*) A-44

TABLE OF AUTHORITIES

CASES:

Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242; 106 S. Ct. 2505; 91 L. Ed. 202 (1986) 8

Duran v. *City of Douglas, Arizona*, 904 F.2d 1372 (9th Cir. 1989) 8

Graham v. *Connor*, 490 U.S. 386 (1989) 14

PAGE

Harlow v. *Fitzgerald*, 457 U.S. 800; 102 S. Ct. 2727; 73 L. Ed. 2d 396 (1982) 8-9

Jones v. *Sherrill*, 827 F.2d 1102 (6th Cir. 1987) 15-16

Mitchell v. *Forsyth*, 472 U.S. 511; 105 S. Ct. 2806; 86 L. Ed. 411 (1985) 2, 8

Reese v. *Anderson*, 926 F.2d 494 (5th Cir. 1991) 17-20

Rhodes v. *McDannel*, 945 F.2d 117 (6th Cir. 1991) 16

Russo v. *City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992) 26

Smith v. *Freland*, 941 F.2d 444 (6th Cir. 1992) 16-17, 24-26

Tennessee v. *Garner*, 471 U.S. 1; 105 S. Ct. 1688; 85 L. Ed. 2d 1 (1985) 10-11, 12, 13, 15, 20-22, 23, 24

Washington v. *Newsome*, 977 F.2d 991 (6th Cir. 1992) ... 9

Yates v. *City of Cleveland*, 941 F.2d 444 (6th Cir. 1991) 9-11

CONSTITUTIONAL AND STATUTORY AUTHORITY:

US Const., Am IV 2

42 U.S.C. 1983 2

In The

Supreme Court of the United States

October Term, 1992

L. NEWSOM, R. PHILLIPS, J. THOMAS, THE CITY OF SOUTHFIELD, a municipal corporation, and the SOUTHFIELD POLICE DEPARTMENT, Jointly and Severally,

Petitioners,

v.

JACQUELINE WASHINGTON, Personal Representative of THE ESTATE OF WILLIAM ELLINGTON, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, L. Newsom, R. Phillips, J. Thomas, the City of Southfield and the Southfield Police Department, respectfully pray that a Writ of Certiorari be issued to review the Judgment, Opinion and Order Denying the Police Officers' Motion for Qualified Immunity. The Opinion and Judgment of the Court of Appeals was entered in this case on October 15, 1992, and the Petition for Rehearing was denied on December 21, 1992, and the Mandate was issued on December 30, 1992.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit entered October 15, 1992 is reprinted in the Appendix herein at A-2. The Order of the Court of Appeals for the Sixth Circuit Denying Petitioners' Motion for Rehearing on December 21, 1992 is reprinted in

Appendix herein at A-1. The Memorandum and Order of the United States District Court for the Eastern District of Michigan entered November 13, 1991 is reprinted in the Appendix herein at A-44.

JURISDICTION

This is a civil action arising under the United States Constitution and, therefore, jurisdiction for filing this action was evoked under 42 U.S.C. 1983 and a denial of qualified immunity pursuant to *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985).

CONSTITUTIONAL PROVISIONS

The constitutional provision involved is Amendment IV which states:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

PROCEDURAL HISTORY

Respondent, Jacqueline Washington, as Personal Representative of the Estate of William Ellington, Jr., filed a Complaint on July 26, 1990 in the United States District Court for the Eastern District of Michigan pursuant to 42 U.S.C. 1983. The Complaint alleged a violation of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. 1983 resulting from the shooting of

the Respondent's Decedent by the Southfield police officers named herein.

On November 13, 1991, the district court denied the Petitioners' Motion for Summary Judgment based upon qualified immunity. The Sixth Circuit Court of Appeals, on October 15, 1992 affirmed the Order Denying the Officers' Qualified Immunity. (Appendix at A-2–A-11). A Petition for Rehearing was sought and denied by the Order of the Court, entered December 21, 1992. (Appendix at A-1).

STATEMENT OF FACTS

The undercover surveillance unit of the Southfield Police Department was searching and closely observing the parking lot at Northland Mall for a black Escort containing two males, who had committed an armed robbery just 20 minutes earlier. Undisputedly, a gun was involved in that first armed robbery.

Meanwhile, Ms. Harding was walking in that parking lot when a black Escort pulled along side of her. The occupants in the vehicle pointed a gun at her intending to make Ms. Harding their second victim.

The surveillance unit was immediately aware that Ms. Harding was being robbed at gunpoint. Maintaining constant communications between the surveillance unit members, they radioed to each other the fact that a second armed robbery was in progress. Simultaneously, Ms. Harding threw up her hands and instinctively backed away in response to looking down the barrel of a rifle pointing out of the passenger side of the Ford Escort. At that instant, the Officers converged on and surrounded the black Escort. Its occupants panicked, then turned the gun at an Officer. As the doors of the

Escort opened and its occupants made a hasty exit, shots were fired.

Less than 22 seconds passed from the time of the radio transmission notifying the unit members of the second armed robbery in progress and the time that William Ellington, Jr. fell from the shooting.

At the time the Officers converged on the black Escort, a long barrel rifle was clearly visible to these Officers. As Ms. Harding began to back away, J. Blessitt, the passenger in the black Escort, admittedly swung his rifle from the direction of the victim to the direction of Officer Phillips. The Officer observed the driver, William Ellington, running at an angle toward him. Officer Phillips was unable to tell whether Ellington was unarmed as he ran.

Prior to the second armed robbery, an understanding of the information provided to the police officers by the victim of the first armed robbery is essential for evaluating the actions of the Officers for purposes of qualified immunity.

On October 26, 1989, Marc and Marcus went to the Northland Shopping Mall where his brother purchased a coat. Marc testified that when he and Marcus exited the mall, a black Escort car slowly came to a stop near them. A gun from inside the car was pointed at his brother Marcus. Marc stated that when he saw the passenger with a gun, he also thought that the driver had a gun "the way his hand was". Marc testified that he turned around and ran towards the mall yelling and screaming for help.

He was stopped by two people, who introduced themselves as police officers. He explained to the Officers that his brother was being robbed at gunpoint by two people in a black Escort.

Marcus testified as follows:

> "I am crying. I am out of my mind. The man asked me did they have a weapon. I say yes and my brother said yes, because we both talked to the man; and he asked us if it was a gun; and we said, yes, it was a black gun."

Marc actually talked to Officer Newsom and Lt. Durbin. Officer Newsom testified that Marc ran up to them and told Lt. Durbin that his brother was being robbed. Marc's description of the robbers indicated they were armed.

Officers Thomas and Phillips, who were in the area, heard information of an armed robbery being relayed over the radio. Officer Phillips heard that an armed robbery had taken place on Greenfield Road and that a small handgun was used. Officer Phillips and Officer Thomas heard that two black males had carried out that armed robbery using a black Escort with no license plate.

The testimony of Officer Thomas was as follows:

> "A. There was a black woman walking through the lot. The vehicle slowed adjacent to her. She leaned down towards the passenger area of the Escort. She, at some time, uprighted her body, put her hands up in the air about head high or close to that proximity and started backing away from the Escort. . . .
>
> A. He had a rifle of some sort. I wasn't sure of the caliber or make at that time. . . .
>
> A. There was a radio transmission that a small handgun had been used. . . .
>
> A. All the surveillance units were getting closer to the Escort . . . One officer said something

to the effect 'There is out next victim,' and another officer said, 'It's going down. Let's take them,' words to that effect. . . .

A. Shots began to fire. The passenger pulled the rifle that he was holding back inside the vehicle and started making movements with that rifle, both down and out. I exited my vehicle. Officer Newsom and Officer Phillips, we — I don't know how simultaneous we were but we all exited our vehicles and started to converge upon the Escort . . ."

Officer Phillips also testified as follows:

"A. I observed the passenger stick his body out of the passenger window, front passenger window, and he had a long barrel rifle in his hand, pointing at the female. . . .

A. The passenger had the gun pointed at the female. She had her hands up and she was stepping backwards. There was loud talking or yelling going on in the vehicle. . . .

A. The female started to back up. The more she backed up, the more the passenger started to come out of the vehicle. . . .

A. The female she backed out of sight. I lost sight of her. The passenger kind of pulled himself into the window and swung the rifle in my direction, pointed at me . . .

A. I exited my vehicle. I never saw anyone else's vehicle besides mine. Officer Newsom's vehicle hit the Escort. I exited my vehicle at which time the passenger pulled the rifle out and pointed it at me again, at which time I fired a shot. He continued to point; I continued to fire . . .

A. He, he was running kind of at an angle towards me, towards the mall because I was still somewhat west, at which point I ordered him to stop, "Police, stop." He did not stop. I fired one shot, at which time my direction drew back to the passenger . . ."

Significantly, Officer Phillips testified that he could *not* tell whether William Ellington was unarmed as he fled.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

At the trial court and the Sixth Circuit Court of Appeals, the opinions indicated that there were outstanding questions of fact. To the contrary, there is no outstanding, material question of fact that is outcome determinative of the issue of whether these Officers are entitled to qualified immunity. It is undisputed that the undercover police officers interrupted an armed robbery. The passenger in the suspects' vehicle did have a gun which he directed at the victim and at the police officers. The driver and the passenger of the suspects' vehicle both fled within seconds upon being stopped by the police officers midway through the armed robbery. During the 22-second interval, the Officers did *not* know whether the driver was armed, although the Officers knew that at least one gun was observed in the previous robbery.

Therefore, the lower court decisions have allowed an important question of law to be decided by the jury on the basis that an outstanding question of fact exists. That appellate determination is clearly erroneous and the test set forth in the appellate decision precludes the availability of qualified immunity to any police

officer. For that reason, this Court should grant the Writ and enter judgment for the police officers on the basis of qualified immunity.

I.

THE SIXTH CIRCUIT COURT OF APPEALS' MINORITY POSITION THAT QUALIFIED IMMUNITY IS NOT AVAILABLE IN AN EXCESSIVE FORCE CASE RUNS CONTRARY TO THIS COURT'S DECISION IN *MITCHELL* v. *FORSYTH*, 472 U.S. 511 (1985).

Although the court's review of a qualified immunity decision is *de novo*, the Respondent still has the burden of establishing that the Officers are *not* entitled to qualified immunity or that there is a genuine issue of material fact regarding their conduct as being violative of the clearly established law.

> "By its very terms, this standard provides that the mere existence of some alleged factual dispute between parties *will not defeat* an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247-248; 106 S. Ct. 2505, 2510, 91 L. Ed. 202 (1986). (Emphasis added).

As recognized in *Duran* v. *City of Douglas, Arizona*, 904 F.2d 1372 (9th Cir. 1989):

> "A police officer's duties are both difficult and dangerous. Circumstances on the beat often require immediate action in order to prevent serious harm to persons or property; rarely is there time for brushing on the Supreme Court's latest pronouncement . . ." *Id.*, 904 F.2d at 1376.

In *Harlow* v. *Fitzgerald*, 457 U.S. 800; 102 S. Ct. 2727; 73 L. Ed. 2d 396 (1982), this Court held that the qualified immunity doctrine has been fashioned in a way to

"permit the resolution of many insubstantial claims on summary judgment, and to avoid "subject[ing] governmental officials either to the cost of trial or to the burdens of broad discovery" in cases where the legal norm the officials were claimed to have violated were not clearly established at the time. *Harlow*, *supra*, 457 U.S. at 817-818.

The *Harlow* court recognized that qualified immunity was an entitlement not to stand trial or to face other burdens of litigation. Rather than a mere defense to liability, it is an entitlement of immunity which is effectively lost if the case is erroneously permitted to go to trial.

In the instant case, the Sixth Circuit Court of Appeals concluded erroneously that the defense of qualified immunity in this case was dependent upon the resolution of some factual issues as follows: "under the circumstances of the case, should objectively reasonable officers have realized that Ellington was, in fact, not armed? Did the officers have probable cause to believe that Ellington posed a threat of serious bodily harm to them or to others? Did Ellington commit, or was he in the process of committing, a crime involving the infliction of serious physical harm? Was deadly force necessary to prevent Ellington's escape? Was Ellington given warning, or was one necessary under the circumstances?" *Washington* v. *Newsom*, 977 F.2d 991, 995 (6th Cir. 1992), Appendix, p. A-8.

Rather than addressing the difficult question directly, the lower courts attempted to avoid the issue by creating a "phantom" material factual issue in dispute.

Respondent submits that the Sixth Circuit perceives that qualified immunity is not available for a police officer in the context of excessive force. In *Yates* v. *City of Cleveland*, 941 F.2d 444 (6th Cir. 1991), Judge

Suhrheinrich perceived that the application of qualified immunity to an excessive force claim is inappropriate.

> "This having been said, I agree that Officer Currie was not entitled to qualified immunity on the excessive force claim because I believe generally, and in this case as well, that qualified immunity is not available in excessive force cases. It is well-established, and it was when the incident in question occurred, that an officer's use of excessive force may rise to the level of an actionable constitutional deprivation. *Rochin* v. *California*, 32 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 2d 183 (1952). Thus, '[t]he only knowledge that the officer[] needed was the knowledge that excessive force was not permitted.' *Stickney* v. *Trikes*, 909 F.2d 1485 (6th Cir. 1990).
>
> It seems to this writer that qualified immunity has no relevance unless there is excessive force, for if there is no excessive force, the officer acted in an objectively reasonable manner under the circumstances and there is no constitutional violation. It also seems that once you have determined the need for defense of excessive force, it seems as a matter of law that the officer has acted unreasonably; and has violated clearly established law. This is not to say that qualified immunity will never be available under any circumstances in excessive force cases; and in fact, the Supreme Court has intimated that such a defense may in some instances be available. For the most part, however, because an officer is equipped with all the knowledge he need regarding the use of excessive force, the only determination left to be made is whether the

conduct was excessive under the circumstances." *Yates, supra*, 941 F.2d at 450.

Therefore, Petitioners assert that the Sixth Circuit Court of Appeals and the trial court in this case erred by failing to apply the entitlement of qualified immunity, as a matter of law, to the facts of this case. The pertinent facts to make that decision are *not* at issue. This factual scenario is the factual scenario that would allow a court to make a determination, that as a matter of law, that these Officers acted reasonably under the circumstances. If an Officer cannot shoot under these circumstances, then there would be little, if any, room available for a qualified immunity defense in any case. For that reason, Petitioners respectfully request that this Court grant their Writ and enter an order based on qualified immunity for the Officers as a matter of law.

II.

THE POLICE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEY DID NOT VIOLATE A CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT BY USING DEADLY FORCE AGAINST A SUSPECT FLEEING AN ARMED ROBBERY WHO PRESENTED A DANGER TO THE POLICE AND THE GENERAL PUBLIC AT THE TIME OF THE SHOOTING.

The real issue here is not whether the Defendant Officers saw the Respondent's Decedent was armed. The real issue here is whether, based on information the Officers possessed, either through radio transmissions or other sources such as complaint by the victims of the first armed robbery, where the Officers could reasonably *believe* that Respondent's Decedent was armed and therefore, posed a threat of serious physical harm to the Officers or to others. This is made explicit in the standard set forth in *Tennessee* v. *Garner*, 471 U.S. 1; 105 S. Ct. 1688; 85 L. Ed. 2d 1 (1985).

> "Where the officer has probable cause to *believe that the suspect poses a threat of serious physical harm, either to the officer or to others*, it is not constitutionally unreasonable to prevent escape using deadly force . . ." 471 U.S. at 11.

In this case, the Officers reasonably believed that Respondent's Decedent was armed, or might have been armed, and therefore, posed a danger to the Officers or to the public generally. The Officers directly observed the willingness of the suspects to use deadly force to perform a crime.

Marc-Antony Preston testified:

> "A. I said I don't know for sure it was one gun but I don't know. It might have been two or three other guns in there. The driver might have had a gun, but all I know is I saw one gun."

Marcus Lewis Preston stated:

> "A. . . . The man asked me did they have a weapon. I said yes and my brother said yes, because we both talked to the man; and he asked us if it was a gun; and we say, yes, it was a black gun."

The Petitioner Officers also testified as follows:

> "Q. Now this person came running over from Greenfield, you heard what he said to Lieutenant Durbin about being robbed?
>
> A. I heard that he was robbed . . . they were armed . . .
>
> Q. He just said they had a gun?
>
> A. He said they were armed."

* * *

"Q. What was the message that was given on that first radio transmission, to the best of your recollection?

A. There was an armed robbery, which had taken place on Greenfield Road, at which time a small handgun was used.

Q. Did it say how many people had been involved with the armed robbery?

A. Yes, sir.

Q. How many?

A. Two.

Q. Did it say which one of the persons had the weapon?

A. No, sir."

Based on the information that the Officers had from radio transmissions, the interview with the victims of the first armed robbery, and the Officers' brief observation of an armed robbery in progress, the Officers reasonably believed that Respondent's Decedent was armed and therefore, posed a threat of serious physical harm to the Officers or to others. The rapid exit by the driver of the vehicle supports the conclusion that William Ellington would do anything to escape.

The *Tennessee* Court specified that the use of deadly force is appropriate:

> "Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction or serious physical harm, deadly force may be used . . ." *Id.*

In the case at bar, the Petitioner Officers witnessed Respondent's Decedent and his friend commit a crime,

i.e. an armed robbery. In addition, a gun had been pointed at the second victim and one of the Officers. Respondent's Decedent's friend, Jerry Blessit, acknowledged that he pointed his gun at the Officers.

Under these circumstances, if Respondent's Decedent and his friend posed a danger to the community, the Officers were justified in using deadly force to prevent their escape or to protect themselves. The Respondent's Decedent and his friend would *not* hesitate to use force to achieve their purpose. These individuals did *not* make any effort to surrender. They did *not* stop and put their hands up on their heads or away from their bodies. These individuals attempted to escape and would do what was necessary to achieve their purpose. These Officers properly concluded that the suspects were armed and dangerous to the Officers, to Ms. Harding and to the public.

Elaborating on the Fourth Amendment standard, the court stated in *Graham* v. *Connor*, 490 U.S. 386 (1989):

> "[I]ts proper application requires careful attention to the facts and circumstances of each particular case. Including the severity of the claim at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight . . . The 'reasonableness' of a particular use of force must be judged from the prospective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . [t]he question is whether the officers' actions are 'objectively reasonable' in light of the acts and circumstances confronting them, without regard to their underlying intent or motivation." 490 U.S. at 1872.

In *Tennessee*, a fleeing suspect attempted to escape over a fence when he was shot and killed by a police officer. This Court held that the use of deadly force by the officer violated the constitutional rights of the suspect because the officer *knew* that the fleeing suspect *was unarmed and posed no danger* to anyone.

Unlike the factual circumstances in *Tennessee*, the Officers in this case were told that both suspects in the Ford were armed. Additionally, the Officers observed the suspects execute their next armed robbery. In this case, the Respondent's Complaint asserts that the Officers should have known that William Ellington was not armed. In essence, Respondent asserts that the Officers were negligent.

> "Negligence does not become 'gross' just by saying so. If the courts are to make sense of the distinction between gross negligence and simply negligence, we must ensure that gross negligence is something more than simply negligence 'with the addition of a vituperative epithet.' *Wilson* v. *Brett*, 11 M.&W. 113, 152 Eng. Rep. 737 (Ex. 1843). The facts alleged in support of the legal conclusion of the gross negligence must be sufficient to charge the government officials with outrageous conduct or arbitrary use of government power."

Jones v. *Sherrill*, 827 F.2d 1102, 1106 (6th Cir. 1987). "Gross negligence" is defined as:

> "We acknowledge that the term 'gross negligence' evades easy definition. In our view, a person may be said to act in such a way as to trigger a Section 1983 claim if he *intentionally does something unreasonable with disregard to a known risk* or a risk so obvious that he must be assumed to have been aware of it, and of a mag-

> nitude such that it is highly probable that harm will follow. (Emphasis added). *Nishiyama* v. *Dickson County, Tenn.*, 814 F.2d 277, 282 (6th Cir. 1987)."

In *Rhodes* v. *McDannel*, 945 F.2d 117 (6th Cir. 1991), the deputies, who responded to a domestic dispute call, entered the home and were confronted by Mr. West wielding a 24" machete approximately 9-12 feet away from the deputies. Only one deputy shot and fatally wounded the decedent. The appellate court properly affirmed the dismissal by summary judgment. In *Rhodes*, *supra*, the fact that not all officers responded in the same manner is irrelevant.

In *Smith* v. *Freland*, 941 F.2d 444 (6th Cir. 1992), the Court concluded that a motion for summary judgment should be granted because, although the individual officer himself was not in any immediate personal danger at the time he fatally discharged his weapon into the fleeing vehicle, the suspect poised a significant threat of physical injury to others.

In *Smith*, a high speed police pursuit resulted in the boxing of the suspect's car. The suspect then backed up his car, sped forward, crashed into the officer's car, backed up again, zoomed around the police car, and smashed into a fence and gate. As the suspect drove past the officer, the officer pulled his gun and fired a shot at the driver. The suspect was fatally wounded while he was still in his vehicle.

In *Smith*, the court refused to review the reasonableness of the officer's action in hindsight:

> "This passage carries great weight in this case, since all parties agree that the *events in question happened very quickly*. Thus, under *Graham*, we

> must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure. (Emphasis added)." *Smith*, 941 F.2d at ___.

In *Reese* v. *Anderson*, 926 F.2d 494 (5th Cir. 1991), the court granted summary judgment in favor of a police officer, who used deadly force in the arrest of a robbery suspect, despite the fact that the suspect's vehicle was totally surrounded by nine police officers and the suspect was actually armed. In *Reese*, plaintiff's decedent and three others were involved in a robbery at a convenience store in Waco. Responding to a radio call, Waco Police Officer Steve Anderson spotted the suspected getaway car and gave chase at speeds of 40-60 miles per hour. Eventually, the car spun out of control and came to a stop with the passenger side directly in front of Anderson's now stopped patrol car. The driver and his three passengers remained inside.

The front seat passenger was plaintiff's decedent, age 20, and the driver was his 16 year old brother. Officer Anderson drew his gun and repeatedly ordered the occupants to raise their hands. Plaintiff's decedent repeatedly raised his hands and then lowered them. The officer believing that decedent was lowering his hands to retrieve a gun fatally shot decedent in the head from a distance of about 10 feet. The court held that the officer reasonably believed that the decedent had retrieved a gun and was about to shoot. Therefore, the

officer had probable cause to believe that the suspect posed a threat or serious physical harm.

In reaching its decision, the Fifth Circuit Court of Appeals relied on *Graham*, *supra*, and *Tennessee*, *supra*. The court noted:

> "The question is whether the amount of force used was 'clearly excessive' and 'objectively reasonable'. The Supreme Court has instructed us on the proper standard for this inquiry:
>
> > 'The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . The "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.'
>
> *Graham*, 109 S. Ct. at 1862."
>
> * * *
>
> "Discussing the case of a fleeing suspect, the Court has explained:
>
> > 'Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon . . . deadly force may be used if necessary to prevent escape, and

> if, where feasible, some warning has been given.'
>
> *Tennessee* v. *Garner*, 105 S. Ct. at 1694, 1701."

The Fifth Circuit Court of Appeals concluded:

> "Applying these standards, we must conclude that Anderson's shooting of Crawford (the decedent) was reasonable and not excessive . . . Under these circumstances [i.e. decedent reaching down several times] a reasonable officer could well fear for his safety and that of others nearby. He could reasonably believe that Crawford had retrieved a gun and was about to shoot. That is, an officer would have probable cause to believe that 'the suspect posed a threat of serious physical harm' . . . The fact that the vehicle was totally surrounded by police does not change matters; had Crawford in fact retrieved a gun from beneath his seat, he could have caused injury or death despite the presence of numerous police officers. Also irrelevant is the fact that Crawford was actually unarmed. Anderson did not and could not have known this."

Reese, 926 F.2d at 500.

In the case at bar, the circumstances confronting the Petitioner Officers were fraught with greater danger than those in *Reese* which warranted the grant of summary judgment in favor of Petitioners. Unlike defendant in *Reese*, Petitioners here actually witnessed the gun being used in an attempted armed robbery. The occupants displayed a willingness to use the gun, if necessary. Further, the gun was pointed at one of the victims and then one of the Officers. The fact that William

Ellington was not the one seen holding the gun is irrelevant. William Ellington and his accomplice were engaged in a serious, violent crime, involving the use of at least one gun. Since the Officers saw that the passenger had a gun, it was reasonable that the driver was also armed.

The important point is that Petitioners did *not* know that the decedent was actually *un*armed during that 22-second interval. Even if Respondent's Decedent did not physically possess the weapon, the gun which his friend was holding was also available for his use. Petitioners submit that where, in this case, Respondent's Decedent was at least within reach of a gun, they are as equally justified as the defendant in *Reese* to believe that Respondent's Decedent posed a threat of physical harm to themselves or to others.

The fact that, in hindsight, the Respondent's Decedent was allegedly unarmed is irrelevant. The important things is whether the Officers reasonably *believed* that Respondent's decedent was armed.

> "The dissent emphasizes that subsequent investigation cannot replace immediate apprehension. We recognize that this is so, see n.13; indeed, that is the reason why there is any dispute. If subsequent arrests were assured, no one would argue that the use of deadly force was justified. Thus, we proceed on the assumption that subsequent arrest is not likely. Nonetheless, it should be remembered that failure to apprehend at the scene does not necessarily mean that the suspect will never be caught. In evaluating the inadequacy of later investigation, the dissent relies on the report of the President's commission on law enforcement and administration of

> justice. It is worth noting that, notwithstanding its awareness of this problem, the commission itself posed a policy for use of deadly force arguably even more stringent than the formulation we adopt today. See President's Commission on law enforcement and administration of justice, Tax Forrest Report; the police 1891 (1967). The Commission proposed that deadly force be used only to apprehend 'perpetrators who, in the course of their crime, threaten the use of deadly force, or if the officer believes that there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if his apprehension is delayed.' In addition, the officer would have 'to know, as a virtual certainty, that the suspect committed an offense for which the use of deadly force is permissible.'"

Tennessee v. *Garner*, 471 U.S. 1, 10; 105 S.Ct. 1694, 1700 n.8.

In *Tennessee*, however, the Court concludes that,

> "without in any way disparaging the importance of these goals, we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of *nonviolent* suspects." (Emphasis added).

In *Tennessee*, the decedent had been merely "suspected" of committing a home burglary. The suspect had not been caught in the commission of that crime. The suspect happened to be in the vicinity of that crime. Furthermore, the Court in *Tennessee* recognized that the type of felony being committed had a profound effect on the degree of discretion given to the officer in that instance. Since a "home burglary" was not a violent crime to people, but only to property, the Court

restricted the purview of the officer and provided the fleeing suspect with additional protection.

Conversely and directly parallel with the facts of this case, the Court in *Tennessee* stated that a different result may have been reached in that case *if* the fleeing felony suspect had committed a crime of violence to a person rather than to property, i.e. an armed burglary. 105 S.Ct. 1694, 1706.

Another crucial element in the Court's reasoning in *Tennessee* was the fact that the officer, *admittedly*, did *not* believe that the suspect had been armed at the time the officer shot. The only reason proffered for the fatal shooting of the alleged fleeing suspect from a home burglary was to prevent the suspect's escape because the officer could not physically capture the young man. 105 S. Ct. 1694, 1705. Since the officer admitted that he knew that the suspect was unarmed and no gun was reported in connection with the home burglary the officer could not reasonably believe the suspect was armed.

Lastly, the final, pertinent factual consideration in *Tennessee* involved the element of timing. In *Tennessee*, no "crucial urgency" to stop the progression of a violent crime existed. There, a need to come to the immediate rescue of the victim of an armed robbery did not exist. Nor was a compelling need to prevent the felon's escape from the scene of a violent crime present or to protect the public from the Decedent.

This case is not Tennessee v. *Garner*

In the instant case, it is undisputed that an armed robbery was being committed by William Ellington, Jr. at the time of the shooting. He was not merely a suspect in the vicinity, but a responsible, knowledgeable, participant in a violent crime. The reason proffered for

the shooting was not based on the need to apprehend since the time frame was such that the commission of the violent act and the flight were inseparable. At no time during the 22 seconds was there any evidence of a surrender by William Ellington, Jr., but only objective evidence that a felon was determined to escape and appeared to be a threat to the Officers and the general public.

It is further undisputed that William Ellington Jr. consented to participating in those risks associated with the commission of an armed robbery. The Officers knew that the crime that occurred earlier and the current crime was the second violent act upon people by Ellington. The Officers knew that, in fact, a gun had been pointed at the Prestons, Ms. Harding, and, at least, one Officer. It was absolutely reasonable during that 22 seconds that the Officers perceived that the felons were armed and dangerous, and that they posed a serious threat to the officers and the public during and immediately after the armed robberies.

In hindsight, the evidence may suggest that these felons were exiting the vehicle for purposes of escape, but that conclusion cannot be taken for granted at that moment and under these circumstances. Even if it could have been known with certainty that the exiting of the vehicle was for purposes of fleeing only, the shots were justified under these circumstances according to *Tennessee*. Notwithstanding the gun shots, both men fled a long distance from the site, including Ellington, who was hit with buckshot only a few feet from the Escort, but continued to run for several hundred feet before he fell.

The assertion that Ms. Harding and the Officers were not in immediate danger is without merit and clearly

wrong. As a matter of law, it was reasonable to believe that William Ellington posed a serious threat of physical harm to the Officers or others because the individual has shown that he is willing to participate in a violent crime and he will seek escape at any cost to himself or others. Not once, did either felon give any indication that he would surrender. William Ellington Jr. demonstrated that he was willing to lay the life of his victims on the line just to receive a stolen article of clothing. He was also willing to lay his life on the line to escape responsibility for that action. It is likely that he would also be willing to risk the life of yet another to escape. An Officer could only reasonably believe that Ellington's demonstration of a total lack of concern for human life would lead to subsequent harm in Ellington's attempts to escape.

According to the holding in *Tennessee*, the officer may use deadly force to prevent, not only the commission of a violent crime, but to prevent the escape of a *suspected* fleeing felon when that suspect poses a threat of serious physical harm after the commission of a violent crime. Therefore, the assertion that Ellington, in hindsight, did not have a weapon or that Ellington was in the process of fleeing, does not alter the required result that there was not a constitutional violation under these circumstances.

Respondent, however, also erroneously asserts that the holding in *Smith* is inapplicable because a suspected fleeing felon was leaving in a car, i.e. the car being a lethal weapon. It is important to note that, although noted, that fact was not dispositive. In *Smith*, the decedent was known not to be armed with a weapon other than the car. The decedent only sought to escape by speeding away in his vehicle. The officer shot into the fleeing vehicle.

"Thus, under *Graham*, we must avoid substituting our personal notions as proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

. . . In light of these cases, and after careful scrutiny of the facts, we are convinced that summary judgment should be granted to Officer Schulcz. After a dramatic chase, Officer Schulcz appeared to have trapped his man at the end of a dark street. Suddenly Mr. Smith freed his car and began speeding down the street. In an instant Officer Schulcz had to decide whether to allow a suspect to escape. He decided to stop him, and no rational jury could say he acted unreasonably. Even if there were a road block at the end of Woodbine Avenue, Officer Schulcz could reasonably believe that Mr. Smith could escape the road block, as he escaped several times previously. In any event, Mr. Smith freed his car from Officer Schulcz's attempted blockade, and was undoubtedly going to escape from Officer Schulcz, if not the entire police force. *Had he proceeded unmolested down Woodbine Avenue, he posed a major threat to the officers manning the road block. Even unarmed, he was not harmless; a car can be a deadly weapon* . . . Finally, rather than confronting the road block, he could have stopped his car and entered one of the neighboring houses, hoping

> to take hostages. Mr. Smith had proven he would do almost anything to avoid capture; Officer Schulcz could certainly assume he would not stop at threatening others." (Emphasis added).

These passages are crucial to the facts of the instant case. These facts in *Smith* parallel the facts of the instant case, except that the facts of the instant case are *more* compelling in favor of the Officers' discretion to shoot under these circumstances. There was no question that an armed robbery occurred. There was no question that a violent felony was in progress when the Officers surrounded the black Escort. There was no question that the suspect intended to escape and would escape at any costs.

The Court further clarified that the reasonableness inquiry in an excessive force action is an objective one, which should disregard the underlying intent or motivation of the Petitioners. To determine whether exigent circumstances exist, a Court should look to the "facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of officers or others, and whether he [was] actively resisting arresting or attempting to evade arrest by flight." *Russo* v. *City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992).

In the instant case, it cannot seriously be challenged that Ellington, after participating in the armed robbery, attempted to flee and posed a serious threat in doing so. For that reason, the Officers' actions were legally justified and objectively reasonable. The Petitioners' Motion for Summary Judgment based on qualified immunity should have been granted.

CONCLUSION

Petitioners assert that the trial court and the Sixth Circuit Court of Appeals erred by failing to enter a judgment as a matter of law for the police officers in this case based upon the doctrine of qualified immunity. The Officers were entitled to qualified immunity in this case and entitled to avoid the necessity of discovery or trial. Petitioners respectfully request that this Court grant their Petition for Certiorari for full consideration of the issues raised herein.

Respectfully submitted,

By: /s/ MARCIA L. HOWE
Counsel of Record

CUMMINGS, McCLOREY, DAVIS & ACHO, P.C.
33900 Schoolcraft
Livonia, Michigan 48150-1392
(313) 261-2400

Counsel for Petitioners

Dated: February 22, 1993

APPENDIX TO PETITION FOR CERTIORARI

• • •

ORDER DENYING REHEARING

(United States Court of Appeals — Sixth Circuit)

(Filed December 21, 1992)

(JACQUELINE WASHINGTON, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM ELLINGTON, JR., Plaintiff-Appellee, v. L. NEWSOM, OFFICER; ET AL., Defendants-Appellants – [*No. 91-2355*])

BEFORE: KEITH and BATCHELDER, Circuit Judges; and WELLFORD, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

OPINION

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

(United States Court of Appeals — Sixth Circuit)

(Decided and Filed October 15, 1992)

(JACQUELINE WASHINGTON, Plaintiff-Appellee, v. L. NEWSOM; R. PHILLIPS; J. THOMAS; THE CITY OF SOUTHFIELD; and THE SOUTHFIELD POLICE DEPARTMENT, Defendants-Appellants – No. 91-2355; ON APPEAL from the United States District Court for the Eastern District of Michigan)

Before: KEITH and BATCHELDER, Circuit Judges; and WELLFORD, Senior Circuit Judge.

WELLFORD, Senior Circuit Judge.

During the evening hours of October 26, 1989, two brothers, Mark Preston and Marcus Preston, were leaving the Northland Mall in Southfield, Michigan. As they approached a nearby bus stop, William Ellington, Jr. and his companion, Jerry Blessit, approached the Prestons in a black Ford Escort. A gun was brandished from inside the car toward Marcus, who was then robbed. Mark ran into the Northland parking lot and there encountered Southfield Police officers, Newsom and Durbin, part of a surveillance team stationed there.

Mark described the robbery of his brother and advised that the occupants of the Escort were armed.[1] Marcus then confirmed that the *passenger* in the car had a long black gun. There is a dispute as to whether either of the Prestons talked about a handgun. The district court found, however, that they told the officers they had seen only one gun. Durbin relayed information

---

[1] **Mark Preston told Newsom and Durbin that the gun came from the passenger's window, and that "it was a long gun . . . like a shotgun."**

about the armed robbery over the police radio to others in the surveillance team, while Newsom, a defendant in this case, left to look for the Escort. Officer Clifford, another member of the surveillance operation, also began to search for the vehicle and its occupants, accompanied by the Prestons. Officers Phillips and Thomas, also defendants, heard the radio transmissions and joined the search.

Clifford observed the black Escort in the parking lot, and advised the Prestons to exit the unmarked police car. Members of the police surveillance team followed and observed the suspects in their car, who then approached a lone woman walking across the parking lot that was described by the district court as "well lighted." The police officers then watched as the suspects proceeded in an attempt to commit a second armed robbery. Defendants Phillips and Thomas saw Blessit, the passenger, lean out the Escort window and point a gun at the intended victim, Sylvia Harding. Clifford did not see either of the suspects with a weapon, but heard on a police radio transmission that Blessit possessed a gun.

Defendant Newsom then intentionally drove his unmarked car into the front of the Escort to interrupt the robbery in progress and prevent flight as the other police approached. The police exited their vehicles, and Blessit pointed the gun in Phillips' direction. Simultaneously, Newsom, Phillips, and Thomas fired on the Escort.[2] Ellington, the driver, immediately exited the car to flee from the scene. Newsom fired five to seven rounds and Phillips fired two rounds at Ellington as he ran away from them. Thomas did not fire any rounds at

---

[2] **Phillips fired four rounds into the car, while Newsom fired eight rounds and Thomas fired twelve rounds; a total of forty-seven shots were fired by the officers in this episode.**

Ellington after he exited the Escort.[3] Newsom or Phillips hit Ellington as he fled with at least one of their shots. He suffered serious injuries and died several months later from complications resulting from the gunshot wound or wounds. It was later determined that Ellington was not armed and the police uncovered only one weapon from the scene — Blessit's rifle.[4]

Plaintiff Jacqueline Washington brought this suit as Ellington's personal representative under 42 U.S.C. § 1983 and Michigan tort law alleging that the individual defendants used excessive force; that the City and its Police Department failed adequately to train the three officer-defendants; and that the Police Department maintained an unconstitutional deadly-force policy. There was also a count of negligence and gross negligence. A joint motion for summary judgment was filed by all defendants, contending that the plaintiffs cannot make out an excessive use of force claim against the City or the individual officers because the City has a deadly force policy which is constitutionally sound, the City's police officers are trained in the use of deadly force in compliance with the policy, the individual defendants' actions in this case were reasonable, and those defendants are entitled to qualified immunity. The district court denied the motion for summary judgment as to all defendants, and both the City and the individual defendants have appealed that denial.

The district court assumed "the existence of a causal link between the [Southfield] policy and the alleged deprivation of Ellington's constitutional rights." The district court denied Southfield's summary judgment

---

[3] **Thomas has been dismissed from this case.**

[4] **Blessit dropped the rifle, exited the Escort, and also attempted to flee. Officers apprehended him after a short chase.**

motion to the effect that it had adopted and followed a constitutional policy on use of deadly force. Southfield has also appealed this decision.

The only basis for appellate review of the district court's opinion and denial of defendants' motions for summary judgment at this juncture is the interlocutory appeal by defendants, Newsom and Phillips, on their claims of qualified immunity. We dismiss the appeal of the City of Southfield for lack of appellate jurisdiction, because its claims are not based on qualified immunity. *See Rich* v. *Mayfield Heights*, 955 F.2d 1092, 1094 (6th Cir. 1992).

Review of the district court's qualified immunity decision is *de novo*. *Yates* v. *City of Cleveland*, 941 F.2d 444, 446 (6th Cir. 1991). We employ the same summary judgment standard employed by the district court. Summary judgment is appropriate when the depositions, affidavits, and other evidence, taken in the light most favorable to the non-moving party, demonstrate that there are no genuine issues of material fact left for resolution at trial, and the moving party is entitled to a decision in its favor as a matter of law. Fed. R. Civ. P. 56 (c); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986).

Police officers performing "'discreditary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Russo* v. *City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)).

> When a claim to qualified immunity is raised within the context of a motion for summary judgment, the non-movant must allege facts sufficient to indicate that the act in question violated

> clearly established law at the time the act was committed. *See Dominque* v. *Telb*, 831 F.2d 673, 677 (6th Cir. 1987) . . . . Thus, the plaintiff must effectively pass two hurdles when facing a defendant on summary judgment who claims qualified immunity. First, the allegations must "state a claim of violation of a clearly established law." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 . . . (1985). Second, the plaintiff must present "evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts."

Russo, 953 F.2d at 1043. The real issue in this case, then, is whether, under the circumstances, the defendant police officers violated the decedent's clearly-defined constitutional right which would be known to reasonable officers in defendants' position.

The Supreme Court has determined that

> [w]here . . . [an] excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right "to be secure in their persons . . . against unreasonable . . . seizures" of the[*ir*] person.

Graham v. *Conner*, 490 U.S. 386, 394 (1989).[5] Police conduct is examined to determine "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their intent or motivation . . . judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 397, 396.

---

[5] ***Graham* was decided some six months before the episode in question.**

"The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon." *Tennessee v. Garner*, 471 U.S. 1, 9 (1985). *Garner* is the leading case on the constitutionality of the use of deadly force by police officers in the situation involving a fleeing felon. The Court reasoned:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. . . .
>
> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Id. at 11-12.

The issue before the district court regarding qualified immunity was whether the objectively reasonable officer would have known that shooting Ellington as he fled from the automobile violated Ellington's constitutional right not to be subjected to an excessive use of force. In order to resolve that issue, *Garner* requires us to make certain determinations. Under the circumstances of this case, should objectively reasonable officers have realized that Ellington was, in fact, not armed? Did the officers have probable cause to believe that Ellington posed a threat of serious bodily harm to them or to others? Did Ellington commit, or was he in the process of committing, a crime involving the infliction of serious physical harm? Was deadly force necessary to prevent Ellington's escape? Was Ellington given warning, or was one necessary under the circumstances?

The defense of qualified immunity in this case is dependent upon the resolution of these factual issues, and in particular on the facts relative to Ellington's flight from the car in the presence of a number of police officers. The district court found, and we agree, that the facts surrounding those inquiries are not undisputed.

The requirements of *Garner* and *Graham* are difficult ones imposed upon police officers, even when actually witnessing an armed robbery with two assailants or conspirators actively involved in another such robbery. The district court was doubtless correct in observing that "it is constitutionally unreasonable to use deadly force against a fleeing felony suspect who is unarmed and nondangerous."

While the qualified immunity question is a close one, and although we believe the answers to some of the questions we have posed may be favorable to the defendants, we must now look to the burden of proof with respect to the qualified immunity issue.

We have only recently addressed the burden of proof in qualified immunity cases:

> The ultimate burden of proof is on the plaintiff to show that the defendants are not entitled to qualified immunity. *Wegener* v. *Covington*, 933 F.2d 390, 392 (6th Cir. 1991). Defendants bear the initial burden of coming forward with facts to suggest that they were acting within the scope of their discretionary authority during the incident in question. *Id.* Thereafter, the burden shifts to the plaintiff to establish that the defendants' conduct violated a right so clearly established that any official in defendants' positions would have clearly understood that they were under an affirmative duty to refrain from such conduct. *Id.* However, "summary judgment would not be appropriate if there is a factual dispute (i.e., a genuine issue of material fact) involving an issue on which the question of immunity turns, such that it cannot be determined before trial whether the defendant did acts that violate clearly established rights . . . . Summary judgment also should be denied if the undisputed facts show that the defendant's conduct did indeed violate clearly established rights. In either event, the case will then proceed to trial, unless the defendant takes a successful interlocutory appeal on the issue of qualified immunity." *Poe* v. *Haydon*, 853 F.2d 418, 426 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007, 109 S. Ct. 788, 102 L.Ed.2d 780 (1989) (citations omitted). *Accord Brandenburg* v. *Cureton*, 882 F.2d 211, 215-16 (6th Cir. 1989).

Rich, 955 F.2d at 1095. *See also Stewart* v. *Baldwin County Board of Education*, 908 F.2d 1499, 1503 (11th Cir. 1990)

(once defense of qualified immunity is raised on summary judgment, plaintiff must adduce evidence to raise a genuine issue of material fact as to whether defendant's conduct violated rights guaranteed by clearly established law).

We may not decide as a matter of law the issue of whether a reasonable officer could have believed his actions were lawful. *See Stewart*, 908 F.2d at 1503. There is a factual dispute, as pointed out by the district court, about the precise information possessed by defendant officers about whether Ellington was probably armed at the time they began shooting at Ellington as he fled from the Escort. Reasonable finders of fact might disagree as to whether, at the time of the flight, an objective police officer should have perceived Ellington as "unarmed" or "nondangerous," particularly in view of the number of police officers present.

In sum, we are persuaded that, under the *Rich* rationale, there is a "genuine issue of material fact involving an issue on which the question of [qualified] immunity turns." *Rich*, 955 F.2d at 1095. We find no error in the district court's finding that "there is a dispute over the physical facts of this case and the inferences that may be drawn from them."

In light of the defendants' motion for summary judgment based upon claims of qualified immunity, we have resolved, for purposes of our decision, all reasonable inference in favor of the non-movant plaintiff who opposes the motion. Under the circumstances, "the legal question of immunity is dependent upon which view of the facts" the trier of facts accepts. *Brandenburg* v. *Cureton*, 882 F.2d 211, 216 (6th Cir. 1989). At the same time, we reiterate that we are not called upon to rule on any disputed factual determinations *at this juncture*, and the ultimate burden is upon plaintiff to establish that

defendants are not entitled to qualified immunity. Plaintiff has the burden to show that the defendants violated a clearly established constitutional right, viewing the defendants' actions by the measure of reasonable and objective standards. *Poe* v. *Haydon*, 853 F.2d 418, 424-426 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989); *Dominque* v. *Telb*, 831 F.2d 673, 676 (6th Cir. 1987). Nor are we at this point called upon to decide whether Ellington was acting as a co-conspirator with his armed companion, Blessit, and whether he might be bound in some fashion by Blessit's conduct and use of the gun at the scene.

We **AFFIRM** the denial of the defendant officers' motion for summary judgment based upon the affirmative defense raised by qualified immunity. We **DISMISS** the appeal of the municipality for lack of appellate jurisdiction. We do not decide the question of the constitutionality of Southfield's policy on use of deadly force.

VERIFIED COMPLAINT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed July 25, 1990)

(JACQUELINE WASHINGTON, Personal Representative of THE ESTATE OF WILLIAM ELLINGTON, JR., Plaintiff, -v- L. NEWSOM, R. PHILLIPS, J. THOMAS, the CITY OF SOUTHFIELD, a municipal corporation, and the SOUTHFIELD POLICE DEPARTMENT, jointly and severally, Defendants — Civil Action No. _____)

JURISDICTIONAL ALLEGATIONS

1. Plaintiff is a citizen of the United States and a resident of the City of Mt. Clemens, located in Macomb County, Michigan.

2. William Ellington, Jr. is a deceased person having died on April 2, 1990 from injuries suffered during the incident out of which this lawsuit arises.

3. Plaintiff is the Personal Representative of the Estate of William Ellington, Jr., Macomb County Probate Court File No. 90-113, 850-IE.

4. William Ellington, Jr. is survived by his mother, Jacqueline Washington; his sisters, Anaykia Ellington, Wilhelmina Ellington and Renee Ellington; and his half-brother Emmanuel Joyner.

5. Defendants Newsom, Phillips and Thomas are believed to be residents of the County of Oakland, State of Michigan.

6. Defendants Newsom, Phillips and Thomas are, and at all material times were, employed by the Southfield Police Department as police officers.

7. Defendant City of Southfield is a municipal corporation existing pursuant to the statutes of the State of Michigan and located in the County of Oakland, State of Michigan.

8. Defendant Southfield Police Department is believed to be a legal entity separate from the City of Southfield.

9. The incident out of which this lawsuit arises occurred in the City of Southfield, County of Oakland, State of Michigan.

10. This Court has jurisdiction pursuant to 28 USC § 1331 as Counts IV and V set forth a claim under 43 [*sic*] USC § 1983.

11. This court has jurisdiction over the remaining counts pursuant to its powers of pendent jurisdiction.

GENERAL ALLEGATIONS

12. Plaintiff realleges the paragraphs set forth above as if fully set forth herein.

13. On October 26, 1989 William Ellington, Jr. was the driver of an automobile which certain officers of the Southfield Police Department, including Defendants Newsom, Phillips and Thomas, suspected as having been involved in two possible armed robberies which allegedly occurred outside of the Northland Mall in the City of Southfield.

14. In their attempts to arrest, detain or seize William Ellington, Jr., Defendants Newsom, Phillips and Thomas illegally and improperly used deadly force, which resulted in William Ellington, Jr. being rendered a quadriplegic until his death on April 2, 1990.

15. William Ellington, Jr. was struck by several of the shots fired by Defendants Newsom, Phillips and Thomas causing him catastrophic injury and eventual death.

16. More specifically Newsom, Phillips and Thomas fired their service revolvers and, at least one of the three, fired a shotgun at William Ellington, Jr. while he was fleeing the scene of the attempted arrest on foot. The Defendants fired at William Ellington, Jr.'s back while he was unarmed.

17. Defendants Newsom, Phillips and Thomas' use of deadly force in the apprehension of William Ellington, Jr. was beyond the course of their employment and/or not within the scope of their authority.

18. Defendants Newsom, Phillips and Thomas' use of deadly force was excessive given the circumstances and constituted a ministerial or operational act.

19. Defendants Newsom, Phillips and Thomas' use of excessive force was done in bad faith.

COUNT I
ASSAULT AND BATTERY.

20. Plaintiff realleges the paragraphs set forth above as if fully set forth herein.

21. On October 26, 1989 Defendants Newsom, Phillips and Thomas, without justifiable provocation and without acting in self defense, unlawfully assaulted and battered William Ellington, Jr. by shooting him as he fled the scene of an alleged armed robbery.

22. At no time during the assault and battery, or the natural events preceding the assault and battery, was William Ellington, Jr. armed or dangerous.

23. At the time of the assault and battery William Ellington, Jr. was not a significant threat to the Defendants, to other officers, or to the general public's safety.

24. At the time of the assault and battery the use of deadly force was not necessary in order to place William Ellington, Jr. under arrest.

25. As a result of the assault and battery William Ellington, Jr. suffered various severe injuries including one to his spinal cord which rendered him a quadriplegic and eventually resulted in his death.

26. As a result of the assault and battery William Ellington, Jr. incurred substantial medical expenses including, but not limited to, the cost of hospital and nursing home care.

27. As a further result of the assault and battery the Estate of William Ellington, Jr. incurred certain funeral and burial expenses.

28. As a further result of the assault and battery William Fllington, Jr. suffered severe physical and emotional pain and suffering.

29. As a further result of the assault and battery the relatives of Eilliam Ellington, Jr. have suffered damages for the loss of financial support and loss of the society and companionship of William Ellington, Jr.

WHEREFORE, Plaintiff demands judgment against Defendants Newsom, Phillips and Thomas in an amount in excess of one million dollars ($ 1,000,000) for compensatory damages, together with interest, costs and attorney fees.

COUNT II
NEGLIGENCE

30. Plaintiff realleges the paragraphs set forth above as if fully set forth herein.

31. On October 26, 1989 Defendants Newsom, Phillips and Thomas owed a duty to William Ellington, Jr. to use only reasonable force in his arrest, apprehension or detention.

32. Defendants Newsom, Phillips and Thomas also owed a duty to William Ellington, Jr. to use deadly force

in his arrest if and only if he posed a significant threat to themselves, to other officers or to the safety of the general public.

33. By shooting William Ellington, Jr. from behind when he was unarmed, Defendants Newsom, Phillips and Thomas breached their duty to not use unreasonable and excessive force in his arrest.

34. By shooting William Ellington, Jr. from behind while he was unarmed, Defendants Newsom, Phillips and Thomas breached their duty not to use deadly force in his apprehension.

35. As the proximate cause of Defendants' actions, William Ellington, Jr. sustained the injuries set forth above.

WHEREFORE, Plaintiff demands judgment against Defendants Newsom, Phillips and Thomas in an amount in excess of one million dollars ($1,000,000) for compensatory damages, together with interest, costs and attorney fees.

COUNT III
GROSS NEGLIGENCE

36. Plaintiff realleges each paragraph set forth above as if fully set forth herein.

37. Defendants Newsom, Phillips and Thomas' actions in shooting William Ellington, Jr. were reckless and demonstrated a substantial lack of concern as to whether his subsequent injury would result.

38. As the proximate cause of Defendants Newsom, Phillips and Thomas' reckless use of deadly force and their substantial lack of concern for William Ellington, Jr.'s possible injury, William Ellington, Jr. has suffered the injuries and damages set forth above.

WHEREFORE, Plaintiff demands judgment against Defendants Newsom, Phillips and Thomas in an amount in excess of one million dollars ($1,000,000) for compensatory damages, together with interest, costs and attorney fees.

COUNT IV
VIOLATION OF THE UNITED STATES
CIVIL RIGHTS ACT
42 US[C] § 1983

39. Plaintiff realleges each paragraph set forth above as if fully set forth herein.

40. At the time and date of the incident Defendants Newsom, Phillips and Thomas were employed as police officers by the City of Southfield and as such were acting under color of law.

41. Defendants Newsom, Phillips and Thomas' acts of wrongfully shooting William Ellington, Jr. constituted a violation of his right against unreasonable search and seizure, in violation of the Fourth Amendment to the United States Constitution.

42. Defendants Newsom, Phillips and Thomas' acts of shooting William Ellington, Jr. constituted a deprivation of his liberty without due process of law in violation of the Fifth Amendment to the United States Constitution.

43. Defendants Newsom, Phillips and Thomas' acts of shooting William Ellington, Jr. violated his right to due process of law and equal protection of laws in violation of the Fourteenth Amendment to the United States Constitution.

44. Defendants Newsom, Phillips and Thomas' deprivation of William Ellington, Jr.'s Fourth, Fifth and Fourteenth Amendment rights constitute a violation of the Federal Civil Rights Act, 42 USC § 1983.

45. As the proximate cause of Defendants Newsom, Phillips and Thomas' violation of 42 USC § 1983, William Ellington, Jr. has suffered the injuries and damages as set forth above.

WHEREFORE, Plaintiff prays for a judgment against Defendants Newsom, Phillips and Thomas as follows:

A. For an amount in excess of one million dollars ($1,000,000) as compensatory damages, plus interest.

B. For an amount in excess of one million dollars ($1,000,000) in punitive damages, plus interest.

C. For an amount equal to Plaintiff's costs and attorney fees, plus interest.

COUNT V

DEPRIVATION OF CIVIL RIGHTS IN VIOLATION OF THE CIVIL RIGHTS ACT, 42 USC § 1983, AS TO THE CITY OF SOUTHFIELD

46. Plaintiff realleges each paragraph set forth above as if fully set forth herein.

47. Upon information and belief, the City of Southfield and Southfield Police Department have a policy, practice or custom of allowing its police officers to use deadly force in violation of the United States Constitution and other laws of the Federal and State government.

48. Defendant City of Southfield and Southfield Police Department have failed to properly train, supervise, discipline and control their police officers in the officers' use of force or deadly force in the arrest or apprehension of suspected criminals.

49. These acts and omissions by Defendants City of Southfield and Southfield Police Department resulted in the use of excessive force by Defendants Newsom,

Phillips and Thomas in the apprehension of William Ellington, Jr.

50. Defendant City of Southfield and Southfield Police Department knew or should have known their procedures and lack of proper supervision and training would lead to violation of citizens' rights.

51. As a result of Defendant City of Southfield and Southfield Police Department's policy, practice or custom as set forth above, William Ellington, Jr. has suffered damages as set forth above.

WHEREFORE, Plaintiff prays for a judgment against Defendants City of Southfield and Southfield Police Department as follows:

A. For an amount in excess of one million dollars ($1,000,000) as compensatory damages, plus interest.

B. For an amount in excess of one million dollars ($1,000,000) in punitive damages, plus interest.

C. For an amount equal to Plaintiff's costs and attorney fees, plus interest.

The statements set forth above are true to the best of my information, knowledge and belief.

/s/ Jacqueline Washington,
Personal Representative of the
Estate of William Ellington, Jr.

HARDIG, McCONNELL, GOETZ & PALMIERE, P.C.
Attorneys for Plaintiff
By: /s/ Joseph L. Hardig, Jr.
And by: /s/ Bradley S. Stout (P40417)
2000 North Woodward Avenue – Suite 100
Bloomfield Hills, Michigan 48013

(*Jurat Omitted*)

REQUEST FOR ADMISSIONS

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated June 14, 1990)

(JACQUELINE WASHINGTON, Personal Representative of THE ESTATE OF WILLIAM ELLINGTON, JR., Plaintiff, -v- L. NEWSOM, R. PHILLIPS, J. THOMAS, the CITY OF SOUTHFIELD, a municipal corporation, and the SOUTHFIELD POLICE DEPARTMENT, jointly and severally, Defendants — Civil Action No. 90CV72162DT)

TO: DEFENDANTS L. NEWSOM, R. PHILLIPS, J. THOMAS, CITY OF SOUTHFIELD AND SOUTHFIELD POLICE DEPARTMENT

NOW COMES the Plaintiff, Jacqueline Washington, Personal Representative of the Estate of William Ellington, Jr., by and through her Counsel, Hardig, McConnell, Goetz & Palmiere, P.C., who pursuant to Federal Rule of Civil Procedure 36 requests the Defendants L. Newsom, R. Phillips, J. Thomas, City of Southfield and Southfield Police Department admit the following facts:

1. That at the time of leaving his vehicle in the parking lot at Northland Mall on the evening of October 26, 1989, until his subsequent arrest, William Ellington, Jr., was unarmed.

2. That on the evening of October 26, 1989, no member of the Southfield Police Department ever saw William Ellington, Jr., in the possession of a firearm.

3. That at the time of the alleged armed robberies and subsequent shooting on October 26, 1989, the only firearm that was present was a rifle in the possession of Jerry Blessit.

4. That no witness ever claimed to have seen William Ellington, Jr., in the possession of a firearm on the evening of October 26, 1989.

HARDIG, McCONNELL, GOETZ & PALMIERE, P.C.
Attorneys for Plaintiff
By: /s/ Joseph L. Hardig, Jr.
And by: /s/ Bradley S. Stout (P40417)
2000 North Woodward Avenue – Suite 100
Bloomfield Hills, Michigan 48013

DATED: June 14, 1990

SUMMONS IN A CIVIL ACTION

(United States District Court —
Eastern District of Michigan)

(Dated July 25, 1990)

Civil Case No: *90CV72162DT* Judge: *AVERN COHN*

Plaintiff name(s):

Jacqueline Washington, Personal Representative of the Estate of William Ellington, Jr.

Plaintiff's attorney, name and address:

Hardig, McConnell, Goetz & Palmiere, P.C., 2000 North Woodward #100, Bloomfield Hills, Michigan 48013

Defendant name(s):

L. Newsom, R. Phillips, J. Thomas, the City of Southfield, a municipal corporation, and the Southfield Police Department, jointly and severally

Name and address of defendant being served:

L. NEWSOM, c/o Southfield Police Dept., 26000 Evergreen, Southfield, MI

To the defendant:

This summons is notification that YOU ARE BEING SUED by the above named plaintiff(s):

1. You are required to serve upon the plaintiff's attorney, name and address above, an answer to your complaint within *20* days after receiving this summons, or take other actions that are permitted by the Federal Rules of Civil Procedure.

2. You must file with the Clerk of Court, the original and one copy of your answer within the time limits specified above.

3. Failure to answer or take other action permitted by the Federal Rules of Civil Procedure may result

in the issuance of a judgment by default against you for the relief demanded in the complaint.

David R. Sherwood,
Clerk of the Court

By: /s/ [*Illegible*],
Deputy Clerk

(seal)

ANSWER TO COMPLAINT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated August, 1990)

(JACQUELINE WASHINGTON, Personal Representative of THE ESTATE OF WILLIAM ELLINGTON, JR., Plaintiff, v L. NEWSOM, R. PHILLIPS, J. THOMAS, the CITY OF SOUTHFIELD, a municipal corporation, and the SOUTHFIELD POLICE DEPARTMENT, jointly and severally, Defendants — Case No. 90CV72162DT; HON. AVERN COHN)

NOW COME the Defendants, CITY OF SOUTHFIELD and SOUTHFIELD POLICE DEPARTMENT, by and through their attorneys, CUMMINGS, McCLOREY, DAVIS & ACHO, P.C., by T. JOSEPH SEWARD, and for their Answer to Plaintiff's Complaint, state as follows:

1. Answering Paragraph 1, Defendants neither admit nor deny the allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

2. Answering Paragraph 2, Defendants neither admit nor deny the allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

3. Answering Paragraph 3, Defendants neither admit nor deny the allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

4. Answering Paragraph 4, Defendants neither admit nor deny the allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

5. Answering Paragraph 5, Defendants neither admit nor deny the allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

6. Answering Paragraph 6, Defendants plead no contest.

7. Answering Paragraph 7, Defendants admit the allegations contained therein.

8. Answering Paragraph 8, Defendants deny each and every allegation contained therein for the reason that same are untrue.

9. Answering Paragraph 9, Defendants neither admit nor deny the allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

10. Answering Paragraph 10, Defendants neither admit nor deny the allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

11. Answering Paragraph 11, Defendants neither admit nor deny the allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

12. Answering Paragraph 12, Defendants incorporate by reference their answers to Paragraphs 12 through 11 of Plaintiff's Complaint.

13. Answering Paragraph 13, Defendants admit that they had received reports of armed robberies occurring at the parking lot of Northland Shopping Mall. Defendants neither admit nor deny the remaining allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

14. Answering Paragraph 14, Defendants deny each and every allegation contained therein for the reason that same are untrue.

15. Answering Paragraph 15, Defendants neither admit nor deny the allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

16. Answering Paragraph 16, Defendants neither admit nor deny the allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

17. Answering Paragraph 17, Defendants deny each and every allegation contained therein for the reason that same are untrue.

18. Answering Paragraph 18, Defendants deny each and every allegation contained therein for the reason that same are untrue.

19. Answering Paragraph 19, Defendants deny each and every allegation contained therein for the reason that same are untrue.

COUNT I

20. Answering Paragraph 20, Defendants incorporate by reference their Answers to Paragraphs 1 through 19 of Plaintiff's Complaint.

21. Answering Paragraph 21, Defendants deny each and every allegation contained therein for the reason that same are untrue.

22. Answering Paragraph 22, Defendants deny each and every allegation contained therein for the reason that same are untrue.

23. Answering Paragraph 23, Defendants deny each and every allegation contained therein for the reason that same are untrue.

24. Answering Paragraph 24, Defendants deny each and every allegation contained therein for the reason that same are untrue.

25. Answering Paragraph 25, Defendants deny each and every allegation contained therein for the reason that same are untrue.

26. Answering Paragraph 26, Defendants deny each and every allegation contained therein for the reason that same are untrue.

27. Answering Paragraph 27, Defendants deny each and every allegation contained therein for the reason that same are untrue.

28. Answering Paragraph 28, Defendants deny each and every allegation contained therein for the reason that same are untrue.

29. Answering Paragraph 29, Defendants deny each and every allegation contained therein for the reason that same are untrue.

WHEREFORE, Defendant prays that this Honorable Court enter a judgment of no cause of action.

COUNT II

30. Answering Paragraph 30, Defendants incorporate by reference their Answers to Paragraphs 1 through 29 of Plaintiff's Complaint.

31. Answering Paragraph 31, Defendants neither admit nor deny that Plaintiff has accurately and fully stated the applicable duties owed to the members of the public which may or may not have included the Plaintiff herein.

32. Answering Paragraph 32, Defendants neither admit nor deny that Plaintiff has accurately and fully stated the applicable duties owed to the members of the public which may or may not have included the Plaintiff herein.

33. Answering Paragraph 33, Defendants deny each and every allegation contained therein for the reason that same are untrue.

34. Answering Paragraph 34, Defendants deny each and every allegation contained therein for the reason that same are untrue.

35. Answering Paragraph 35, Defendants neither admit nor deny the allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

WHEREFORE, Defendant prays that this Honorable Court enter a judgment of no cause-of action.

COUNT III

36. Answering Paragraph 36, Defendants incorporate by reference their Answers to Paragraphs 1 through 35 of Plaintiff's Complaint.

37. Answering Paragraph 37, Defendants deny each and every allegation contained therein for the reason that same are untrue.

38. Answering Paragraph 38, Defendants deny each and every allegation contained therein for the reason that same are untrue.

WHEREFORE, Defendant prays that this Honorable Court enter a judgment of no cause of action.

COUNT IV

39. Answering Paragraph 39, Defendants incorporate by reference their Answers to Paragraphs 1 through 38 of Plaintiff's Complaint.

40. Answering Paragraph 40, Defendants admit the allegations contained therein.

41. Answering Paragraph 41, Defendants deny each and every allegation contained therein for the reason that same are untrue.

42. Answering Paragraph 42, Defendants deny each and every allegation contained therein for the reason that same are untrue.

43. Answering Paragraph 43, Defendants deny each and every allegation contained therein for the reason that same are untrue.

44. Answering Paragraph 44, Defendants deny each and every allegation contained therein for the reason that same are untrue.

45. Answering Paragraph 45, Defendants deny each and every allegation contained therein for the reason that same are untrue.

WHEREFORE, Defendant prays that this Honorable Court enter a judgment of no cause of action.

COUNT V

46. Answering Paragraph 46, Defendants incorporate by reference their Answers to Paragraphs 1 through 45 of Plaintiff's Complaint.

47. Answering Paragraph 47, Defendants deny each and every allegation contained therein for the reason that same are untrue.

48. Answering Paragraph 48, Defendants deny each and every allegation contained therein for the reason that same are untrue.

49. Answering Paragraph 49, Defendants deny each and every allegation contained therein for the reason that same are untrue.

50. Answering Paragraph 50, Defendants deny each and every allegation contained therein for the reason that same are untrue.

51. Answering Paragraph 51, Defendants deny each and every allegation contained therein for the reason that same are untrue.

WHEREFORE, Defendant prays that this Honorable Court enter a judgment of no cause of action.

DEMAND FOR TRIAL BY JURY

NOW COME the Defendants, CITY OF SOUTHFIELD and SOUTHFIELD POLICE DEPARTMENT, by and through their attorneys, CUMMINGS, McCLOREY, DAVIS & ACHO, P.C., and herewith demand trial by jury of the above-entitled cause of action.

AFFIRMATIVE DEFENSES

NOW COME the Defendants, CITY OF SOUTHFIELD and SOUTHFIELD POLICE DEPARTMENT, by and through their attorneys, CUMMINGS, McCLOREY, DAVIS & ACHO, P.C., by

T. JOSEPH SEWARD, and for their Affirmative Defenses to Plaintiff's Complaint, state as follows:

1. That Plaintiff's Complaint fails to state either a cause of action or a claim upon which relief can be granted against these Defendants.

2. That the Plaintiff's Complaint fails to state a cause of action against these Defendants, by virtue of the doctrine of governmental immunity which is afforded to these Defendants for the reason that at all times relevant hereto, they were engaged in the exercise and discharge of a governmental function.

3. That the Plaintiff's actions were such that the Plaintiff himself was solely responsible for any injuries or damages sustained, such actions or activities constituting negligence, contributory negligence and/or comparative negligence, such as to bar the Plaintiff's Complaint in whole or in part.

4. That Plaintiff has failed to properly mitigate his damages.

5. That Plaintiff's cause of action arising under 42 U.S.C. Section 1983 includes certain amendments to the Constitution which do not support a cause of action as alleged herein. Therefore, the claims arising under the Fifth and Fourteenth Amendments are barred based upon the pleadings made herein.

6. That the CITY OF SOUTHFIELD does not have any policy, practice or procedure which is constitutionally defective as alleged herein and therefore is subject to a dismissal.

7. That the individual officers are entitled to invoke the doctrine of good faith immunity.

8. That the officers acting upon probable cause had reason to believe the Plaintiff was a significant threat to

the life of the officers and/or members of the public which justified the use of deadly force herein. As such, their actions were objectively reasonable and therefore entitled to a dismissal.

9. That Defendants reserve the right to plead such additional affirmative defenses as become known through the course of discovery.

10. That Defendants demand a reply to each and every affirmative defense herein.

CUMMINGS, McCLOREY, DAVIS & ACHO, P.C.
By: /s/ T. JOSEPH SEWARD (P-35095)
33900 Schoolcraft
Livonia, Michigan 48150-1392
Attorneys for Defendants

Dated: August __, 1990

PROTECTIVE ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated January 29, 1991)

(JACQUELINE WASHINGTON, Personal Representative of THE ESTATE OF WILLIAM ELLINGTON, JR., Plaintiff, -v- L. NEWSOM, R. PHILLIPS, J. THOMAS, the CITY OF SOUTHFIELD, a municipal corporation, and the SOUTHFIELD POLICE DEPARTMENT, jointly and severally, Defendants – Civil Action No. 90-CV-72162-DT; Hon. Avern Cohn)

At a session of said Court, held in the U.S. Courthouse, City of Detroit, County of Wayne, State of Michigan, on: January 29, 1091.

PRESENT: THE HONORABLE AVERN COHN,
U.S. DISTRICT COURT JUDGE.

Upon reading the above stipulation;

IT IS HEREBY ORDERED that a Protective Order shall be issued regarding the production of Defendants' policy regarding the apprehension of fleeing felons and use of deadly force. The terms of the Protective Order are as follows:

A. A copy of the policy shall be provided to Plaintiff's counsel and any expert that Plaintiff's counsel deems necessary to see the policy and no one else;

B. That no copies of the policy shall be made absent further order of the Court or agreement by the parties;

C. That the policy shall not be filed with the Court unless further ordered by this Court or by agreement by the parties;

D. That the copy shall be immediately returned to Defendants' counsel at the conclusion of this litigation.

/s/ AVERN COHN
District Court Judge

(Certification Omitted)

DEFENDANTS' ANSWER TO PLAINTIFF'S COMPLAINT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated October 9, 1990)

(JACQUELINE WASHINGTON, Personal Representative of THE ESTATE OF WILLIAM ELLINGTON, JR., Plaintiff, -v- L. NEWSOM, R. PHILLIPS, J. THOMAS, the CITY OF SOUTHFIELD, a municipal corporation, and the SOUTHFIELD POLICE DEPARTMENT, jointly and severally, Defendants — Civil Action No. 90-CV-72162-DT; HON. _____)

NOW COME the Defendants, L. NEWSOM, R. PHILLIPS, and J. THOMAS, by and through their attorneys, CUMMINGS, McCLOREY, DAVIS & ACHO, P.C., by T. JOSEPH SEWARD, and for their Answer to Plaintiff's Complaint, state as follows:

1. Answering Paragraph 1, Defendants neither admit nor deny the allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

2. Answering Paragraph 2, Defendants neither admit nor deny the allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

3. Answering Paragraph 3, Defendants neither admit nor deny the allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

4. Answering Paragraph 4, Defendants neither admit nor deny the allegations contained therein for want of

sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

5. Answering Paragraph 5, Defendants plead no contest.

6. Answering Paragraph 6, Defendants plead no contest.

7. Answering Paragraph 7, Defendants admit the allegations contained therein.

8. Answering Paragraph 8, Defendants deny each and every allegation contained therein for the reason that same are untrue.

9. Answering Paragraph 9, Defendants neither admit nor deny the allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

10. Answering Paragraph 10, Defendants neither admit nor deny the allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

11. Answering Paragraph 11, Defendants neither admit nor deny the allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

12. Answering Paragraph 12, Defendants incorporate by reference their Answers to Paragraphs 1 through 11 of Plaintiff's Complaint.

13. Answering Paragraph 13, Defendants admit that they had received reports of armed robberies occurring

at the parking lot of the Northland Shopping Mall. Defendants neither admit nor deny the remaining allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

14. Answering Paragraph 14, Defendants deny each and every allegation contained therein for the reason that same are untrue.

15. Answering Paragraph 15, Defendants neither admit nor deny the allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

16. Answering Paragraph 16, Defendants neither admit nor deny the allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

17. Answering Paragraph 17, Defendants deny each and every allegation contained therein for the reason that same are untrue.

18. Answering Paragraph 18, Defendants deny each and every allegation contained therein for the reason that same are untrue.

19. Answering Paragraph 19, Defendants deny each and every allegation contained therein for the reason that same are untrue.

COUNT I

20. Answering Paragraph 20, Defendants incorporate by reference their Answers to Paragraphs 1 through 19 of Plaintiff's Complaint.

21. Answering Paragraph 21, Defendants deny each and every allegation contained therein for the reason that same are untrue.

22. Answering Paragraph 22, Defendants deny each and every allegation contained therein for the reason that same are untrue.

23. Answering Paragraph 23, Defendants deny each and every allegation contained therein for the reason that same are untrue.

24. Answering Paragraph 24, Defendants deny each and every allegation contained therein for the reason that same are untrue.

25. Answering Paragraph 25, Defendants deny each and every allegation contained therein for the reason that same are untrue.

26. Answering Paragraph 26, Defendants deny each and every allegation contained therein for the reason that same are untrue.

27. Answering Paragraph 27, Defendants deny each and every allegation contained therein for the reason that same are untrue.

28. Answering Paragraph 28, Defendants deny each and every allegation contained therein for the reason that same are untrue.

29. Answering Paragraph 29, Defendants deny each and every allegation contained therein for the reason that same are untrue.

WHEREFORE, Defendant prays that this Honorable Court enter a judgment of no cause of action.

COUNT II

30. Answering Paragraph 30, Defendants incorporate by reference their Answers to Paragraphs 1 through 29 of Plaintiff's Complaint.

31. Answering Paragraph 31, Defendants neither admit nor deny that Plaintiff has accurately and fully stated the applicable duties owed to the members of the public which may or may not have included the Plaintiff-Decedent herein.

32. Answering Paragraph 32, Defendants neither admit nor deny that Plaintiff has accurately and fully stated the applicable duties owed to the members of the public which may or may not have included the Plaintiff-Decedent herein.

33. Answering Paragraph 33, Defendants deny each and every allegation contained therein for the reason that same are untrue.

34. Answering Paragraph 34, Defendants deny each and every allegation contained therein for the reason that same are untrue.

35. Answering Paragraph 35, Defendants neither admit nor deny the allegations contained therein for want of sufficient information upon which to form a belief as to the truth of the averments and therefore leave the Plaintiff to her proofs.

WHEREFORE, Defendant prays that this Honorable Court enter a judgment of no cause of action.

COUNT III

36. Answering Paragraph 36, Defendants incorporate by reference their Answers to Paragraphs 1 through 35 of Plaintiff's Complaint.

37. Answering Paragraph 37, Defendants deny each and every allegation contained therein for the reason that same are untrue.

38. Answering Paragraph 38, Defendants deny each and every allegation contained therein for the reason that same are untrue.

WHEREFORE, Defendant prays that this Honorable Court enter a judgment of no cause of action.

COUNT IV

39. Answering Paragraph 39, Defendants incorporate by reference their Answers to Paragraphs 1 through 38 of Plaintiff's Complaint.

40. Answering Paragraph 40, Defendants admit the allegations contained therein.

41. Answering Paragraph 41, Defendants deny each and every allegation contained therein for the reason that same are untrue.

42. Answering Paragraph 42, Defendants deny each and every allegation contained therein for the reason that same are untrue.

43. Answering Paragraph 43, Defendants deny each and every allegation contained therein for the reason that same are untrue.

44. Answering Paragraph 44, Defendants deny each and every allegation contained therein for the reason that same are untrue.

45. Answering Paragraph 45, Defendants deny each and every allegation contained therein for the reason that same are untrue.

WHEREFORE, Defendant prays that this Honorable Court enter a judgment of no cause of action.

COUNT V

46. Answering Paragraph 46, Defendants incorporate by reference their Answers to Paragraphs 1 through 45 of Plaintiff's Complaint.

47. Answering Paragraph 47, Defendants deny each and every allegation contained therein for the reason that same are untrue.

48. Answering Paragraph 48, Defendants deny each and every allegation contained therein for the reason that same are untrue.

49. Answering Paragraph 49, Defendants deny each and every allegation contained therein for the reason that same are untrue.

50. Answering Paragraph 50, Defendants deny each and every allegation contained therein for the reason that same are untrue.

51. Answering Paragraph 51, Defendants deny each and every allegation contained therein for the reason that same are untrue.

WHEREFORE, Defendant prays that this Honorable Court enter a judgment of no cause of action.

RELIANCE UPON JURY DEMAND

NOW COME the Defendants, L. NEWSOM, R. PHILLIPS, and J. THOMAS, by and through their attorneys, CUMMINGS, McCLOREY, DAVIS & ACHO, P.C., by T. JOSEPH SEWARD, and hereby rely upon the Jury Demand previously submitted by Plaintiff in the within cause of action.

AFFIRMATIVE DEFENSES

NOW COME the Defendants, L. NEWSOM, R. PHILLIPS, and J. THOMAS, by and through their attorneys, CUMMINGS, McCLOREY, DAVIS & ACHO, P.C., by T. JOSEPH SEWARD, and for their Affirmative Defenses to Plaintiff's Complaint, state as follows:

1. That Plaintiff has failed to state either a cause of action or a claim upon which relief can be granted against this Defendant.

2. That the Plaintiff's Complaint fails to state a cause of action against this Defendant by virtue of the doctrine of governmental immunity which is afforded to this Defendant for the reason that at all times relevant hereto, it was engaged in the exercise and discharge of a governmental function.

3. That the Plaintiff Decedent's actions were such that the Plaintiff Decedent himself was solely responsible for any injuries or damages sustained, such actions or activities constituting negligence, contributory negligence and/or comparative negligence, such as to bar the Plaintiff's Complaint in whole or in part.

4. That Plaintiff has failed to properly mitigate her damages.

5. That Plaintiff's cause of action under 42 U.S.C. Section 1983 including allegations regarding certain Amendments to the Constitution do not support a cause of action as alleged herein. Therefore, the claims arising under the Fifth and Fourteenth Amendments are barred based upon the pleadings made herein.

6. The City of Southfield does not have any policy, practice or procedure which is constitutionally defective as alleged herein.

7. That the individual Officers are entitled to invoke the doctrine of good faith immunity.

8. That the Officers were acting upon probable [*sic*] and had reason to believe that Plaintiff Decedent posed a significant threat to the life of the Officers and/or members of the public which justified the use of deadly force herein. As such, the actions were objectively reasonable and therefore are entitled to a dismissal.

9. Defendant reserves the right to plead such additional affirmative defenses as may become ascertained during the ongoing course of discovery.

10. Defendant demands an answer to each and every affirmative defense herein.

CUMMINGS, McCLOREY, DAVIS & ACHO, P.C.
By: /s/ T. JOSEPH SEWARD (P-35095)
33900 Schoolcraft
Livonia, Michigan 48150-1392
Attorneys for Defendants

Dated: October 9, 1990

MEMORANDUM AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated November 1, 1991)

(JACQUELINE WASHINGTON, Personal Representative of THE ESTATE OF WILLIAM ELLINGTON, JR., Plaintiff, v. LESLIE NEWSOM, REGINALD PHILLIPS, and the CITY OF SOUTHFIELD, a municipal corporation, Jointly and Severally, Defendants – No. 90-72162)

I.

This is a 42 U.S.C. § 1983 case. Plaintiff, Jacqueline Washington (Washington), is the personal representative of the estate of William Ellington, Jr. (Ellington), an armed robbery suspect who was shot and killed by defendant, City of Southfield (Southfield) police officers, defendants Leslie Newsom (Newsom) and Reginald Phillips (Phillips).[1] Washington says Newsom and Phillips, who are emloyed by Southfield, used excessive force in their attempt to arrest Ellington. As a result, Washington alleges: (1) Newsom and Phillips' use of deadly force violated Ellington's constitutional rights, (2) Southfield adopted a policy that sanctions the unconstitutional use of deadly force, (3) Southfield violated Ellington's constitutional rights by failing to properly train, supervise and control Newsom and Phillips' use of deadly force, (4) assault and battery as to Newsom and Phillips, (5) negligence as to Newsom and Phillips, and (6) gross negligence as to the [*sic*] Newsom and Phillips. Defendants move for summary judgment as to all claims.

---

[1] **Initially, Washington also named James Thomas, another Southfield police officer, as a defendant. At oral argument held on October 21, 1991, Washington agreed to dismiss him from the case.**

They say, among other things, that Newsom and Phillips' use of deadly force was neither excessive nor unreasonable. For the reasons which follow, defendants' motion for summary judgment as to all claims will be denied.

II.

The following facts, as gleaned from the documents, deposition testimony and affidavits in the record, are not in material dispute.

A.

On October 29, 1989, at approximately 8:45 p.m., Ellington and Jerry Blessit (Blessit) robbed Marcus Lewis Preston (Lewis), who at that time was with his brother, Mark, Preston (Preston). The robbery occurred at a bus stop on Greenfield Road near Northland Mall in Southfield. While therobbery was in progress, Preston ran into the Northland Mall parking lot (the parking lot), where he contacted Newsom and Gregory L. Durbin (Durbin), a Southfield police officer. Newsom and Durbin were part of a five officer surveillance team (the surveillance team) posted in the parking lot that evening. Durbin was the commander of the surveillance team, which patrolled the parking lot in no fewer than four unmarked police vehicles. The surveillance team was in radio contact with marked backup vehicles that were in the nearby vicinity. The parking lot is a large open space.

Newsom immediately left in an unmarked vehicle to search for Ellington and Blessit after hearing Preston tell Durbin that they: (1) were driving a black Ford Escort, and (2) were armed. Shortly afterwards, Lewis ran into the parking lot, where he also contacted Durbin. Preston and Lewis both told Durbin that during the robbery they had seen only one gun, a rifle held by Blessit, and that he was a passenger in the Ford Escort.

Durbin relayed over the police radio the information given by Preston and Lewis, who were then transferred to an unmarked vehicle driven by David Clifford (Clifford), another member of the surveillance team.

B.

Later that night, while in Clifford's vehicle, Preston and Lewis spotted the Ford Escort driving in the parking lot, which was well lighted. After Preston and Lewis exited the vehicle, Clifford and the defendant officers, all of whom were in unmarked vehicles, staked out the Ford Escort from different locations in the parking lot. Shortly thereafter, Clifford and the defendant officers witnessed Ellington and Blessit attempt to commit an armed robbery of a woman, Sylvia Harding (Harding), who was walking in the parking lot. The attempted armed robbery of Harding occurred toward the middle of the parking lot, shortly after Northland Mall closed. Few, if any, additional pedestrians were in the nearby vicinity. James Thomas (Thomas), another member of the surveillance team, and Phillips observed Blessit extend himself from the Ford Escort's passenger window and point a rifle at Harding. Clifford did not see either Blessit or Ellington with a rifle, but while the robbery was in progress he heard over the police radio that Blessit had a gun, although the type of gun was not specified.

C.

At that point, the parking lot was sparsely occupied with parked cars and Newsom said over the police radio, "Let's take them." Four unmarked vehicles, all driven by the members of the surveillance team, simultaneously converged on Blessit and Ellington, who attempted to escape in the Ford Escort. Newsom prevented Blessit and Ellington's escape by intentionally colliding with the Ford Escort, which then collided with

Phillips' vehicle. Newsom then observed Blessit point a rifle at Phillips.

Newsom, Phillips and Thomas opened fire on Blessit and Ellington, who remained in the Ford Escort. In particular, Thomas fired 12 rounds at the Ford Escort; Newsom fired approximately eight rounds at the Ford Escort; and Phillips fired at least four rounds at the Ford Escort.

After Newsom, Phillips and Thomas opened fire, Ellington exited the Ford Escort and attempted [*to*] flee on foot. Newsom fired five to seven rounds at Ellington's back. Phillips also fired several rounds at Ellington's back. Ellington was struck by at least one round. After having reached a distance of approximately 20 to 50 feet from the Ford Escort, Ellington fell to the ground. Thomas did not fire any rounds at Ellington as he was attempting to escape.

Neither Newsom nor Phillips at any time saw Ellington in the possession of a firearm. Over the course of the entire incident, which lasted approximately one minute, Newsom and Phillips fired their weapons 35 times.[2]

Ellington, who was unarmed throughout the incident, sustained severe injuries as a result of the gunshot wounds. Several months after he was shot, Ellington died from complications arising from his wounds.

D.

Southfield's policy as to the use of deadly force (the policy) states in relevant part:

I. GENERAL POLICY:

Officers of the Southfield Police must always bear in mind that the use of firearms should be con-

---

[2] **Shortly after Ellington exited the Ford Escort, Blessit dropped his rifle and fled the vehicle. He was shot several times before being detained several hundred yards away.**

fined to situations of strong and compelling need. The laws of this state and the rules of this department demand that officers use only that reasonable degree of force necessary to effect an arrest.

"VIOLENT FELONY" SHALL INCLUDE, BUT IS NOT LIMITED TO, THE FOLLOWING CRIMES: MURDER, MANSLAUGHTER, KIDNAPPING, ROBBERY, ASSAULTS OF A FELONY LEVEL, AND CRIMINAL SEXUAL CONDUCT WHERE VIOLENCE.

II. PROCEDURE:

A. An officer may use firearms to protect himself or herself and others from serious bodily harm or death.

B. An officer may use firearms to effect the arrest of, or prevent the escape of, a person when:

1. The officer reasonably believes the person has committed a "*Violent Felony*" where the person has used or threatened the use of deadly force in this commission of that felony; or

2. The officer reasonably believes there is a substantial risk that a felon to be arrested will cause death or serious bodily harm if the arrest is delayed; or

3. The officer reasonably believes a felon is armed or will endanger the physical safety of others if not captured; or

4. However, an officer may use firearms to effect the arrest of, or prevent the escape of, "*Violent Felons*" only when the force that the officer employs will create no

> substantial and unreasonable risk of injury to innocent persons.

D. [*sic*, *E.*]

Newsom and Phillips testified at depositions that, during the course of their employment with the Southfield Police Department, they received training in the apprehension of fleeing felons and the use of deadly force. However, Newsom and Phillips have also testified that they could not recall the instructions contained in the policy.

In particular, Newsom has been a member of the Southfield Police Department since 1971. When asked if it has given him instruction in the use of deadly force, Newsom said:

> "We have firearms training, which is approximately every other month. Again they don't touch on too much when to use the weapon, but how to use the weapon. They provide us with the policy and procedure, which we are all acquainted with, should be acquainted with."

Newsom testified the Southfield Police Department shows a videotape addressing the use of deadly force. However, Newsom could not recall if he had actually seen the videotape. In approximately 1985, Newsom attended a seminar, sponsored by Oakland Community College, in which the use of deadly force was addressed.

Phillips has been a member of the Southfield Police Department since 1985. He testified in deposition he could not specifically recall the instruction he received concerning the policy. He, like Newsom, said the Southfield Police Department periodically showed a videotape addressing the use of deadly force. However, he could not recall if he had actually seen the videotape. Phillips

has attended seminars, sponsored by the Federal Bureau of Investigation and Oakland Community College, in which the use of deadly force was addressed.

In addition, Thomas, who fired several rounds at the Ford Escort, has been a member of the Southfield Police Department since 1970. Since that time, has not attended any seminar in which the use of the deadly force was discussed. He could not specifically recall the dates and times of instances in which he was instructed by his superiors in the use of deadly force. Thomas testified in deposition:

> We have procedures and policies [as to the use of deadly force] that are periodically updated and we are at some point in time advised of those new policies and/or procedures and we are to taken [*sic*] it upon ourselves, if not given permission, to review them.

III.

Although Washington's complaint alleges violations of the Fourth, Fifth and Fourteenth Amendments, the constitutionality of the challenged application of force is to be analyzed solely by reference to the Fourth Amendment's prohibition against unreasonable seizures of the person. *Tennessee* v. *Garner*, 471 U.S. 1, 7-22 (1985).

A.

The reasonableness inquiry in an excessive force case is an objective one, that is the Court must determine whether Newsom and Phillips' actions were objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. *Scott* v. *United States*, 436 U.S. 128, 137-139 (1978). "The reasonableness of a particular use of force must be judged from the perspective of a reasonable

officer on the scene, rather than with 20/20 hindsight." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989).

It is constitutionally unreasonable to use deadly force against a fleeing felony suspect who is unarmed and nondangerous. *Tennessee* v. *Garner*, 471 U.S. at 11-12. However, "[w]here the officer has probable cause to believe that the suspect poses a threat of [*sic*] serious threat of physical harm [to the officer or to others], deadly force may be used if necessary to prevent escape, and if, where feasible some warning has been given." *Id.*

B.

Applying these principles, the Court finds there is a dispute over the physical facts of this case and the inferences that may be drawn from them. In other words, a trier of fact could reasonably conclude that Newsom and Phillips' use of deadly force against Ellington was objectively unreasonable.

1.

In particular, a trier of fact could reasonably conclude that Newsom and Phillips acted unreasonably when they shot at Ellington when he fled from the Ford Escort on foot. Newsom and Phillips say their use of deadly force was reasonable in light of their belief that Ellington was armed and posed a serious threat of physical harm to members of the surveillance team and others. However, the record suggests Newsom and Phillips may have or should have known that Ellington was unarmed. At the time of the incident, the parking lot was well lighted. Thus, Newsom and Phillips may have been able to observe that Ellington, as he was running from the Ford Escort, was not in possession of a firearm. None of the members of the five-officer surveillance team saw Ellington in the possession of a firearm.

As stated in Part II, Preston and Lewis reported to Durbin that they had seen only one gun, a rifle, which was known to be in the possession of Blessit.[3] The fact that Ellington did not fire any shots after Newsom and Phillips opened fire on the Ford Escort also suggests they had reason to believe he was unarmed. Moreover, there is no evidence Ellington, when attempting to flee, made any motions to indicate he was armed, i.e. reaching as if to draw a gun.

Next, the evidence would allow a trier of fact to reasonably conclude: (1) Ellingtohn's attempt to escape on foot was futile, and (2) instead of firing at Ellington as he fled, Newsom and Phillips could have effected his arrest by cornering him with police vehicles. First, members of the surveillance team were within close proximity of Ellington when he attempted to flee. No fewer than four unmarked police cars could have radioed for the assistance of marked backup vehicles. The incident occurred shortly after Northland Mall closed for the evening and as a result, the parking lot was not congested with parked vehicles or traffic. The surveillance team's stakeout, and subsequent convergence on the Ford Escort, was not significantly

---

[3] **Newsom and Phillips say it was reported over the police radio that Ellington or Blessit possessed a handgun. This assertion is significant as it suggests Newsom and Phillips reasonably believed that: (1) the rifle, known to be the possession of Blessit, was not the only firearm to which Ellington had immediate access, and (2) Ellington may have fled the Ford Escort while carrying a concealed weapon. However, there is a material dispute of fact as to whether the defendant officers reasonably believed that Ellington may have possessed a handgun. First, Preston and Lewis have testified they saw only a single rifle. Durbin has testified that he only relayed over the police radio information that had been given to him by Preston and Lewis. Moreover, the Southfield Police Department taped the general frequency transmissions made during the night of the incident. The tape makes no reference to the use of a handgun, per se. Instead, the transmission on the tape states only that suspects possessed "a gun".**

obstructed or fettered. Therefore, members of the surveillance team were able to freely maneuver their vehicles within the parking lot, from which Ellington was attempting to flee.

2.

There is also evidence to suggest that Newsom and Phillips acted unreasonably when they opened fire on the Ford Escort, that is before Ellington attempted to flee on foot. It is unclear whether the members of the surveillance team identified themselves as police officers when they converged on the Ford Escort. They were driving unmarked vehicles without sirens. Blessit has testified that, prior to his being fired upon, he never heard any member of the surveillance team identify himself as a police officer.[4] Thus, a trier of fact could reasonably conclude that Thomas opened fire on Ellington and Blessit before they had an opportunity to surrender to individuals who they knew to be police officers. *See Yates* v. *City of Cleveland*, 941 F.2d 444 (6th Cir. 1991) (failure of police officer to identify himself suggests it was not objectively reasonable for him to use deadly force).[5]

---

[4] **Phillips testified that, before the defendant officers opened fire on the Ford Escort, he yelled, "Police!" Thomas testified that he heard an officer identify himself, although he could be [*sic*] specific as to who it was or what he said. However, this evidence, in light of Blessit's contradictory testimony, merely creates a question of fact as to whether any member of the surveillance team identified himself.**

[5] **In arguing that Newsom and Phillips' decision to open fire on the Ford Escort was objectively reasonable, defendants rely heavily [*on*]: (1) the fact that Blessit pointed his rifle at Phillips and (2) *Reese* v. *Anderson*, 926 F.2d 494, 498-499 (5th Cir. 1991).**

The fact that Blessit was in possession of a rifle does little, standing alone, to suggest that Newsom and Phillips were justified when they opened fire on Ellington while he was in the Ford Escort. First, there is no evidence of record indicating the context in which

(*concluded on page A-54*)

3.

In holding that a trier of fact could reasonably conclude that Newsom and Phillips were unreasonable in their use of deadly force, the Court also relies heavily on the undisputed fact that, over the course of the incident, Newsom and Phillips together fired 35 rounds at Ellington and Blessit within approximately one minute. There is no evidence Blessit or Ellington fired a single round at any member of the surveillance team. As a result, a trier of fact could reasonably conclude Newsom and Phillips fired their weapons in a promiscuous manner. *See Dale* v. *Janklow*, 828 F.2d 481, 484 (8th Cir. 1987) (use of force is more likely to be excessive if there is an unreasonable relationship between the need and amount of force used).

C.

Newsom and Phillips say they are protected by the doctrine of qualified immunity. This argument lacks merit. Whether a police officer protected by qualified immunity may be held personally liable for an allegedly unlawful action turns on the "objective legal reasonable-

---

(*continued from page A-53*)

Blessit pointed the rifle. For instance, it is unclear whether Blessit pointed the rifle in order to threaten the members of the surveillance team or whether he pointed it unintentionally, that is, as a visceral response to the converging of vehicles on the Ford Escort. Moreover, as stated *supra*, there is evidence that Newsom or Phillips knew or should have known that Ellington was not in possession of a firearm. Nevertheless, they indiscriminately opened fire.

In addition, the facts in *Reese* are readily distinguishable from those at issue here. In *Reese*, the Court of Appeals for the Fifth Circuit found the defendant's use of deadly force objectively reasonable. However, the suspected felon in *Reese*, unlike Ellington, was not attempting to flee. Moreover, the Fifth Circuit held in *Reese* the defendant reasonably concluded that the suspected felon was armed and dangerous. Here, as stated *supra*, there is a question of material fact as to whether Newsom and Phillips knew or should have known that Ellington was not in possession of a firearm.

ness" of an action assessed in the light of legal rules that were clearly established at the time it was taken. *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1991). At the time of the shooting, it was clearly established that Ellington had a right not to be shot unless there was probable cause to believe he posed a threat to pursuing officers or to others. *Robinson* v. *Bibb*, 840 F.2d 349, 351 (6th Cir. 1988) (citing *Garner* v. *Memphis Police Department*, 710 F.2d 240, 246 (6th Cir. 1983), *aff'd and rem'd sub nom*, *Tennessee* v. *Garner*, 471 U.S. 1 (1985)). Because the right that Newsom and Phillips are alleged to have violated was clearly established, and because, as stated *supra*, a trier of fact could reasonably conclude that their shooting of Ellington was unlawful; that is, objectively unreasonable, Newsom and Phillips are not entitled to qualified immunity at this juncture of the case.[6] Thus, the motion for summary judgment as to the claim of excessive force as to Newsom and Phillips is DENIED.

IV.

Washington says Southfield's general policy (the policy) as to the use of deadly force is unconstitutional. Defendants' motion for summary judgment as to this claim is based on their contention that the policy is constitutional.

---

[6] **Qualified immunity is purely a legal question to be decided by the Court. *Donta* v. *Hooper*, 774 F.2d 716 (6th Cir. 1985). However, the jury in fact becomes the final arbiter of Newsom and Phillips' immunity claim since the "legal question of immunity is completely dependent upon which view of the facts is accepted by the jury." *Brandenburg* v. *Cureton*, 882 F.2d 211, 215 (6th Cir. 1989). If the jury determines Newsom and Phillips opened fire on Ellington without a reasonable belief that someone was in danger of serious bodily injury, then as a legal matter no reasonable police officer could believe such gunfire would not have violated Ellington's constitutional rights. On the other hand, if the jury determines Newsom and Phillips reasonably opened fire on Ellington, then they will be entitled to qualified immunity.**

A municipality may be sued directly under 42 U.S.C. § 1983 if it is alleged to have caused a constitutional tort through the adoption of an unconstitutional policy statement. *City of St. Louis* v. *Prapotnik*, 485 U.S. 112 (1988). In *Garner*, 471 U.S. at 11, the Supreme Court held unconstitutional Tennessee's statute governing the use of force during arrest insofar as it authorized the use of deadly force against unarmed, nondangerous suspects. The policy arguably authorizes unconstitutional police behavior. Specifically, it authorizes the use of deadly force against a person who has committed a violent felony, where the person has threatened the use of deadly force in the commission of that felony. In other words, the policy may be read to implictly sanction the use of deadly force against suspects who have in the past threatened the use of deadly force but are no longer armed or dangerous. This policy is thus in direct contravention of the constitutional standard articulated in *Garner*, which as stated *supra*, prohibits the use of deadly force against unarmed, nondangerous suspects.[7] Thus, defendants' motion for summary judgment as to this claim, i.e. that Southfield adopted an unconstitutional policy that caused the deprivation of Ellington's rights, is DENIED.

V.

Washington says that Southfield improperly trained Newsom and Phillips as to the use of deadly force. The inadequacy of police training may serve as the basis for the 42 U.S.C. § 1983 liability "only where the failure to train amounts to deliberate indifference to the rights of

---

[7] **Southfield does not dispute that Newsom and Phillips were acting pursuant to the policy when they opened fire on Ellington. Thus, for the purposes of this motion only, the Court will assume the existence of a causal link between the policy and the alleged deprivation of Ellington's constitutional rights.**

persons with whom the police come into contact." *City of Canton* v. *Harris*, 489 U.S. 378, 388 (1989). The record, fairly read, suggests that Southfield has not taken reasonable steps to train its officers in the use of deadly force. For instance, Neither Newsom nor Phillips could recall the terms of the policy. In addition, Thomas has testified that officers are to "take it upon" themselves to learn the terms of the policy. There is no evidence Southfield had a training or instructional program in which officers are continuously advised as to the use of deadly force. Southfield apparently has a videotape in which the use of deadly force is discussed, but Phillips and Newsom could not recall if they had ever seen it. As a result, a trier of fact could reasonably conclude that Southfield, by addressing the grave issue of deadly force in an indifferent and perfunctory manner, has displayed "deliberate indifference" to the rights of Ellington, an unarmed fleeing felon. Thus, defendants' motion for summary judgment as to Washintgon's claim of negligent training is DENIED.

VI.

Defendant says Newsom and Phillips are immune from common law tort liability. However, a police officer is immune for common law tort liability only if: (1) he or she is acting or reasonably believes he or she is acting within the scope of her authority, (2) the governmental agency for which the officer is working is engaged in the exercise or discharge of a governmental function, and (3) his or her conduct does not amount to gross negligence that is the proximate cause of the injury. M.C.L.A. § 691.1407(2).[8] In light of the discussion in

---

[8] **M.C.L.A. § 691.1407(2) defines gross negligence as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."**

Part III, the Court finds that a trier of fact could reasonably conclude that Newsom and Phillips' conduct constitutes gross negligence. Thus, defendants' motion for summary judgment as to the common law tort claims is DENIED.

SO ORDERED.

/s/ AVERN COHN
United States District Judge

Dated: November 1, 1991
Detroit, Michigan